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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri,
Petitioner,

v.

HAROLD LYNCH, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Amendment permits a Circuit Court of Appeals to remand an action against a State Attorney General for an evidentiary trial on plaintiffs' substantive constitutional claims without deciding whether the relief sought by plaintiffs would violate the Eleventh Amendment.

2. Whether the Eleventh Amendment bars an action against a State Attorney General in federal court under 42 U.S.C. § 1983 which challenges the constitutionality of a State statute, when the State Attorney General has no legal authority to enforce, has not attempted to enforce and has no connection whatsoever with the allegedly unconstitutional State statute.

3. Whether the Eleventh Amendment bars an action against a State Attorney General in federal court under 42 U.S.C. § 1983 which challenges the constitutionality of a State statute, when the statute was fully implemented years ago and nothing under the statute remains to be enforced.

PARTIES TO THIS PROCEEDING

A complete list of the parties to the proceeding is contained in the caption to the June 20, 1994 opinion of the Eighth Circuit Court of Appeals. Petition Appendix (hereinafter "Pet. App.") A-21 through A-22. The petitioner, a co-defendant below, is Jeremiah W. (Jay) Nixon, the Attorney General of Missouri.

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OPINIONS BELOW

The August 20, 1993 order of the District Court has not been reported. It is reprinted at pages A-18 to A-20 of the accompanying appendix. The June 20, 1994 opinion of the Court of Appeals is reported at 27 F.3d 336 (8th Cir. 1994) and is reprinted at pages A-21 to A-26 of the appendix. The order of August 11, 1994 denying suggestions for rehearing en banc and rehearing by the panel is not reported. This order is reprinted at page A-27 of the appendix.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals reversing the District Court's dismissal of plaintiffs' fourth amended complaint against the Attorney General of Missouri as violative of the Eleventh Amendment was entered on June 20, 1994. The order denying the petition for panel rehearing was entered on August 11, 1994. Jurisdiction for this Court rests on 28 U.S.C §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XI: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

STATEMENT OF THE CASE

1. Allegations of Plaintiffs' Fourth Amended Complaint

On April 28, 1993, plaintiffs, former and retired employees of the State of Missouri, filed their fourth amended complaint (hereinafter "plaintiffs' complaint") in the United States District Court, Western District of Missouri. Plaintiffs attempted to state a cause of action under 42 U.S.C. § 1983 against the Public School Retirement System of Missouri (hereinafter "PSRS"), its Board members, its Executive Secretary, and Jeremiah W. (Jay) Nixon, the Attorney General of Missouri (hereinafter "Attorney General"), in his official and statutory capacity. See Appendix A, Pet. App. A-1 - A-13.

Count I of plaintiffs' complaint prays for a declaratory judgement that Mo. Rev. Stat. § 104.342 (Supp.1991) either on its face, as applied to plaintiffs, or both, violates the Equal Protection Clause of the Fourteenth Amendment, and results in a taking of plaintiffs' property in violation of the Due Process Clause of

the Fourteenth Amendment to the United States Constitution. Pet. App. A-10. This retirement election provision allowed then present employees of the State of Missouri to choose between two options. Firstly they could transfer from PSRS, a contributory retirement system, to the Missouri State Employees Retirement System (hereinafter "MOSERS"), a non-contributory retirement system with a refund of their PSRS retirement contributions. Alternatively they could choose to remain in PSRS with no refund of retirement contributions. Mo. Rev. Stat. § 104.342 (Supp. 1991). Former or retired employees, like plaintiffs, remained in PSRS with the full benefits they contracted for when they were employees of the State of Missouri. Plaintiffs, as former State employees, contend that their exclusion from the election provision which provided a one time lump-sum refund of personal retirement contributions to then present employees upon their transfer to MOSERS violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Pet. App. A-8 - A-9.

Count II of plaintiffs' complaint prays for an order enjoining defendants from maintaining and implementing the PSRS in a manner which violates the Equal Protection Clause, and an order that all personal retirement contributions made by plaintiffs during their employment with the State be refunded from PSRS without any diminution of benefits.[1] Count II further requests an order preventing enforcement against plaintiffs of that portion of Mo. Rev. Stat. §169.050.5 (Supp. 1991) which in the event all of

[1] Though plaintiffs' prayer for relief includes a request for an order enjoining "defendants" from maintaining or implementing the PSRS in a manner inconsistent with the Equal Protection Clause, paragraph 29 of plaintiffs' complaint specifically states that any available injunctive relief must be entered against the PSRS. Pet. App. A-10. The Eighth Circuit apparently interpreted these ambiguous allegations as a request for injunctive relief against the Attorney General. *See* Pet. App. A-25. For the reasons set forth below, any requested injunctive relief against the Attorney General would violate the Eleventh Amendment.

Mo Rev. Stat. §104.342 (Supp. 1991), is declared unconstitutional, would cause plaintiffs to forfeit any creditable service if their contributions are refunded. Pet. App. A-11 - A-12 . The result of plaintiffs' request, if granted, would be that they would be the only state employees, current or former, who would remain in PSRS with full benefits and nevertheless receive refunds of their retirement contributions.

Plaintiffs' complaint contains no allegation that the Attorney General of Missouri enforced, threatened to enforce, or had any legal authority to enforce the challenged statute against plaintiffs. The only allegation in the entire complaint against the Attorney General states as follows: "Defendant Jeremiah W. (Jay) Nixon is the Attorney General of the State of Missouri and maintains his official office at the permanent seat of government in Jefferson City, Cole County, Missouri. Defendant Nixon has the powers and duties provided by the Constitution and laws of the State of Missouri. Defendant Nixon is made a party hereto in his official capacity and in his statutory capacity." Pet. App. A-4, ¶10.

2. Prior Proceedings

In the District Court, the Attorney General filed a motion to dismiss plaintiffs' fourth amended complaint arguing, *inter alia*, that the Eleventh Amendment to the United States Constitution prohibits this suit against the Attorney General. Pet. App. A-14 - A-15.[2] On August 20, 1993, the District Court dismissed

[2] The Attorney General also argued in support of his motion to dismiss that plaintiffs' complaint failed to present a "case or controversy," thus depriving the Court of Article III jurisdiction; and plaintiffs' complaint failed to state a cause of action under 42 U.S.C. § 1983 under the Fifth or Fourteenth Amendments to the Constitution in that the Attorney General, in his official capacity, is not a "person" for purposes of § 1983, plaintiffs failed to allege the deprivation of a substantive due process right, and plaintiffs complaint failed to state a claim for denial of equal protection. Pet. App. A-14 - A-15.

(Footnote 2 continued on next page)

plaintiffs' complaint against the Attorney General, holding "that plaintiffs' allegations against the Attorney General are barred by the Eleventh Amendment because plaintiffs do not seek prospective relief." Pet. App. A-19. The Court reasoned:

> Here, the relief sought by plaintiffs is retroactive in nature. There is simply no ongoing violation of federal law. Any alleged violation of federal law occurred in 1987 and 1989 when the then present state employees received refunds of their pension contributions to the exclusion of plaintiffs under §104.342. As the Attorney General notes, the refund scheme was fully completed in 1987 and 1989. The Attorney General does not continue to enforce the statute because it has already been fully implemented. This Court may not issue a declaratory judgement finding that the state or state official violated federal law in the past when there is no ongoing violation of federal law. *Green v. Mansour*, 106 S.Ct. 423, 438 (1985). Plaintiffs seek a cash reimbursement of their contributions because they allege the state violated their constitutional rights in the past when it did not grant them refunds. This request amounts to a retroactive damage award which is barred by the Eleventh Amendment. *See, Edelman*, 94 S.Ct. at 1358.

Pet. App. A-19 - A-20.

Plaintiffs appealed the dismissal to the Eighth Circuit Court of Appeals. In its order dated June 20, 1994, the Court of Appeals

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(Footnote 2 continued)

The District Court did not reach any of these grounds, but dismissed plaintiffs' complaint against the Attorney General solely on Eleventh Amendment grounds. Pet. App. A-18 - A-20. The Court of Appeals did not address any of these issues — each of which could have served as an independent basis for affirming the District Court's judgment — but instead reversed the District Court's judgment solely because it disagreed with the District Court's interpretation of the Eleventh Amendment. Pet. App. A-21 - A-26.

reversed the District Court's dismissal of plaintiffs' complaint as to the Attorney General concluding, "that summary judgement in favor of PSRS and the Attorney General was not appropriate." Pet. App. A-25.[3] The Court rejected the District Court's Eleventh Amendment analysis and held:

> If the statutory scheme is in fact unconstitutional, the continued implementation of such a scheme constitutes an ongoing violation of federal law, regardless of whether some or all persons similarly situated to plaintiffs have already received their refunds.
>
> At this time we need not determine the outer limits of the district court's authority to order particular remedies, such as refunds to plaintiffs. It is sufficient for now to say that the district court clearly has the authority to find the statutory scheme unconstitutional and to order an appropriate remedy.

Pet. App. A-25 (footnote omitted). The Court remanded the action for an "evidentiary hearing" on plaintiffs' substantive constitutional claims. Pet. App. A-26. The Court "retain[ed] jurisdiction" over the case and directed the District Court to certify to it findings of fact and conclusions of law based on the evidentiary hearing. Pet. App. A-26.

On July 18, 1994, the Attorney General petitioned for rehearing and filed suggestions for rehearing en banc arguing, *inter alia*, that the Eleventh Amendment prohibited plaintiffs' claims against the Attorney General. The petition and suggestion were denied by the Court of Appeals on August 11, 1994. Appendix E, Pet. App. A-19.

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[3] The Court erroneously referred to the Attorney General's motion as a motion for summary judgement. The Attorney General filed a motion to dismiss after being added as a party to plaintiffs' fourth amended complaint. The Attorney General based its motion and the District Court based its ruling solely on the allegations contained in plaintiffs' fourth amended complaint.

REASONS FOR GRANTING THE WRIT

Preliminary Statement

The Eleventh Amendment symbolizes the principle that in joining the federal Union, States did not surrender all incidents of their sovereignty. Among the attributes of sovereignty that States retained was their sovereign immunity - including immunity from suit in federal court. *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy*, 506 U.S. ___, 113 S.Ct. 684, 689 (1993). The Eleventh Amendment, which provides this immunity from suit in federal court, stands not so much for what it says, but for the understanding of our constitutional structure which it confirms: that states retained their sovereign immunity upon joining the federal Union; that the federal judicial authority is limited by that sovereignty; and that States will not be subject to suit without its consent. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). This Court has scrupulously guarded the fundamenal protection of the Eleventh Amendment in recognition of the prominent role of state sovereignty in our federalist system.

The decision of the Eighth Circuit Court of Appeals below effectively obliterates the fundamental protection afforded States by the Eleventh Amendment. It did so in three ways. First, by allowing a suit against a State official in the absence of any connection between that official and the State statute that allegedly violated the complainant's rights, it is allowing a suit against the State sovereign itself. No principle in Eleventh Amendment immunity jurisprudence is more inviolate than the principle that a State, without consent, may not be sued in federal court regardless of the relief sought. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 100 (1984). The Eighth Circuit's decision not only conflicts with this Court's decision in *Ex parte Young*, 209 U.S. 123 (1908), but decisions in other Circuits which hold, that in the absence of a sufficient connection

between the official sued and the enforcement of the allegedly unconstitutional State statute, the action constitutes a suit against the State in violation of the Eleventh Amendment.

If left unchecked, this decision will have devastating consequences on States and their officials because it effectively allows perspective plaintiffs to sue any State official in order to get a judgment against the State itself. This is a complete end run around the Eleventh Amendment that will expand exponentially the number of federal court lawsuits which heretofore have been barred by the Eleventh Amendment.

Secondly, the Court of Appeals decision allows claims against State officials for retrospective relief in violation of the Eleventh Amendment. This Court held in *Young* that suits against State officials for prospective injunctive relief are not suits against the State itself in violation of the Eleventh Amendment. The Court carved out this exception to immunity in order to balance the necessity that State officials comply with federal law with the State's fundamental right not to be sued in federal court. *Puerto Rico Aqueduct*, 113 S.Ct. at 688-89, and *Papasan v. Allain*, 478 U.S. 265, 278 (1986). The Eighth Circuit's opinion — which allows a suit to determine the constitutionality of a State statute that was fully implemented over 5 years ago and nothing under the statute remains to be implemented — does not serve the federal interests in ensuring the Supremacy of federal law. A declaration regarding that statute, and any monetary relief ordered ancillary to such a declaration, would necessarily be retrospective in violation of the Eleventh Amendment. This type of compensatory or deterrence relief to vindicate an alleged past violation of federal law is not sufficient to overcome the dictates of the Eleventh Amendment, and do not serve the policy underlying the *Young* exception to immunity.

In the final blow to the Eleventh Amendment protection afforded States, the Eighth Circuit's ruling requires States to go

to trial on the substantive merits of plaintiffs' constitutional claims before a determination is made on whether the relief sought by the plaintiffs would violate the Eleventh Amendment. "[T]he value to the States of their Eleventh Amendment immunity..., is for the most part lost as litigation proceeds past motion practice." *Puerto Rico Aqueduct*, 113 S.Ct. at 688. The Court of Appeals opinion neglected to address, much less resolve, the fundamental questions of whether the suit against the State official is in reality a suit against the State, what relief is permissible and against whom such relief would be appropriate, consistent with the Eleventh Amendment. This holding subjects States to litigation on the merits of constitutional claims without determining whether Eleventh Amendment would bar such claims. This in and of itself violates the Eleventh Amendment and is inconsistent with this Court's decision in *Puerto Rico Aqueduct*. Not only will this decision put enormous litigation burdens on States and their officials, but it will clog the federal court's with trials on substantive claims that ultimately will have proven to be unnecessary. Without intervention from this Court, the State of Missouri and potentially every State will be stripped of its fundamental constitutional right not to be sued in federal court.

For all of these reasons and the reasons set forth below, this Court should grant certiorari and ultimately reverse the Eighth Circuit's erroneous decision.

1. The Eleventh Amendment prohibits a Circuit Court of Appeals from remanding an action against a State Attorney General for an evidentiary trial on plaintiffs' substantive constitutional claims without deciding whether the relief sought by plaintiffs would violate the Eleventh Amendment.

The Eighth Circuit in this case completely abdicated its responsibility under the Eleventh Amendment to resolve, *before* ordering a trial on plaintiffs' substantive constitutional claims,

whether the Attorney General is entitled to immunity from suit in federal court. By reversing the District Court's determination that plaintiffs' claims against the Attorney General are barred by the Eleventh Amendment, and remanding the case for an evidentiary hearing on plaintiffs' substantive constitutional claims, the court denied the Attorney General Eleventh Amendment immunity. Denial of the Attorney General's "claims to Eleventh Amendment immunity purport to be a conclusive determination[ ] that [he has] no right not to be sued in federal court." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. ___, 113 S.Ct. 684, 688 (1993).

The Eleventh Amendment provides States and their officials a fundamental constitutional protection inherent in our form of government. Any court opinion — particularly a Circuit Court of Appeals opinion — that effectively eliminates that protection, as the decision below does here, is of grave constitutional importance to every state.

The Court of Appeals entire Eleventh Amendment analysis below was:

> If the statutory scheme is in fact unconstitutional, the continued implementation of such a scheme constitutes an ongoing violation of federal law, regardless of whether some or all persons similarly situated to plaintiffs have already received their refunds.
>
> At this time we need not determine the outer limits of the district court's authority to order particular remedies, such as refunds to plaintiffs. It is sufficient for now to say that the district court clearly has the authority to find the statutory scheme unconstitutional and to order an appropriate remedy.

Pet. App. A-25. It is clear that the Court of Appeals reversed the District Court solely on the basis that it believed that if the statute is unconstitutional, there is an "ongoing violation of federal

law." This superficial — and erroneous — analysis of the Eleventh Amendment issue completely ignores the fundamental question of whether plaintiffs' claims against the Attorney General constitute a suit against the State of Missouri, which cannot proceed regardless of the relief sought. It also failed to heed the express admonition of this Court in *Puerto Rico Aqueduct* that the Eleventh Amendment issue be resolved *before* any other proceedings are allowed to go forward. Both of these errors seriously undermine the fundamental protections given States by the Eleventh Amendment, and must be clearly and expressly rejected by this Court.

A. The Court of Appeals' opinion remanding the case for a trial on plaintiffs' substantive constitutional claims without determining whether plaintiffs' claims against the Attorney General constitute a suit against the State of Missouri in violation of the Eleventh Amendment, denies States their fundamental Constitutional right not to be sued in federal court without consent, a right which cannot be vindicated without intervention from this Court.

The Eleventh Amendment protects States from being sued in federal court. "[I]n the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Papasan v. Allain*, 478 U.S. 265, 276 (1986), quoting *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 100 (1984), and *Puerto Rico Aqueduct*, 113 S.Ct. at 687-88.[4] "This withdrawal of jurisdiction effectively confers immunity from suit." *Puerto Rico Aqueduct*, 113 S.Ct. at 687. "This jurisdictional bar applies

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[4] In enacting the Civil Rights Act of 1871, 42 U.S.C. §1983, the statute at issue in this case, Congress did not abrogate the Eleventh Amendment immunity of the States. *Edelman v. Jordan*, 415 U.S. 651, 676-77 (1974), and reaffirmed in *Quern v. Jordan*, 440 U.S. 332, 338-345 (1978).

regardless of the nature of the relief sought." *Pennhurst*, 465 U.S. at 100.

When a suit is brought against state officials, the first question to be resolved is whether the suit is actually a suit against the state itself. *Id.* at 101. "It is ... well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment." *Edelman*, 415 U.S. at 663. "And, as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief." *Pennhurst*, 465 U.S. at 102, citing *Cory v. White*, 457 U.S. 85, 91(1982).

The Court of Appeals, thus was required — as a matter of federal court jurisdiction — to determine whether plaintiffs' action against the Attorney General constituted a suit against the State of Missouri. It plainly did not even address that issue. The Court simply proceeded to determine whether the relief sought was retrospective or prospective in nature, an analysis that becomes relevant *only if* the suit does not constitute a suit against the State itself.

In its opinion, the Court of Appeals relied solely on its belief that the continued implementation of the allegedly unconstitutional statutory scheme constitutes an ongoing violation of federal law. For this reason, the Court presumably believed that plaintiffs' suit fell within the very narrow exception to the general principle of immunity carved out by this Court in *Ex parte Young*, 209 U.S. 123 (1908).[5]

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[5] In that case, the Court held that the Eleventh Amendment does not prevent federal courts from ordering prospective injunctive relief against state officials "to prevent a continuing violation of federal law," *Green v. Mansour*, 474 U.S. 64, 68 (1985), citing *Young*, 209 U.S. at 155-56, "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green*, 474 U.S. at 68, citing *Pennhurst*, 465 U.S. at 102.

The analysis utilized by the Court of Appeals, while erroneous in and of itself,[6] omitted the threshold inquiry required by *Young* itself - namely whether the official sued has the requisite connection with the enforcement of the allegedly unconstitutional statute to justify the removal of immunity necessary to vindicate the federal interest in assuring compliance with federal law. As the Court in *Young* expressly recognized: "In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party." *Young*, 209 U.S. at 158.[7]

In denying the Attorney General Eleventh Amendment immunity based solely on its erroneous analysis of whether plaintiffs claims for relief are prospective under *Young*, the Eighth Circuit failed to address the most fundamental component of Eleventh Amendment immunity analysis - namely whether this lawsuit against the Attorney General is actually a suit against the State of Missouri, which absent a waiver of Eleventh Amendment immunity, cannot proceed regardless of the relief sought. *Cory*, 457 U.S. at 90-91. The Attorney General and the State of Missouri are entitled to have this fundamental question determined before being subjected to defending the merits of plaintiffs' underlying action. *Puerto Rico Aqueduct*, 113 S.Ct. at 688.

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[6] As will be explained in Section 3 of this petition, even were this Court to apply the analysis of *Young* to the Attorney General's conduct, it is clear that implementation of this statute was fully completed 5-7 years ago when the then present employees received refunds of their personal contributions to the exclusion of plaintiffs. Thus, the relief requested by plaintiffs is retrospective in nature and would violate the Eleventh Amendment in any event. *See Green*, 474 U.S. at 73 and *Edelman*, 415 U.S. at 668.

[7] As explained below in Section 2 of this petition, the Attorney General does not come close to having such a connection with the State statute at issue in this case.

Without intervention from this Court, this case will be returned to the District Court for a evidentiary hearing on the merits of the underlying action, and the State of Missouri — and ultimately every State within the Eighth Circuit — will be stripped of the "fundamental constitutional protection" afforded to it by the Eleventh Amendment. *Id.* Because any of the relief requested by plaintiffs against the Attorney General would in essence be a judgement against the State of Missouri, which in this case could result in a substantial money judgement and the dismantling of two State retirement systems, it is critically important that this Court take this Petition and reverse the Eighth Circuit's plainly erroneous denial of Eleventh Amendment immunity to the State of Missouri.

B. The Court of Appeals' opinion remanding the case for a trial on plaintiffs' substantive constitutional claims without determining under the Eleventh Amendment what relief would be permissible, and against whom such relief would be appropriate, violates the Eleventh Amendment and is inconsistent with this Court's decision in *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S.___, 113 S.Ct. 684 (1993).

The inquiry necessary to determine whether a suit violates the Eleventh Amendment is impossible without looking at the substance of the claims involved and the identity of the parties against whom such claims are made. Yet the Court of Appeals opinion in this case did not distinguish between the parties involved. In fact, the Court flatly refused to examine the permissible scope of available remedies to determine if any remedies against the Attorney General would violate the Eleventh Amendment. Pet. App. A-25.

The Court of Appeals specifically held that "[a]t this time we need not determine the outer limits of the district court's authority to order particular remedies, such as refunds to the plaintiffs." *Id.* The Court further stated that the District Court clearly has the

authority to declare the statutory scheme unconstitutional and to order an appropriate remedy.[8] The Court then remanded the case to the District Court for an evidentiary hearing on plaintiffs' substantive constitutional claims and ordered the District Court to certify to it findings of fact and conclusions of law.[9] This opinion fails to give sufficient direction to the District Court as to what type of relief is permissible, and against whom the relief would be appropriate, consistent with the Eleventh Amendment.

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[8]Though it appears from this statement that the Court believed plaintiffs' claim for declaratory relief would be appropriate, the Court failed to indicate whether this relief could appropriately be ordered against the Attorney General. This omission is characteristic of the Court's failure to distinguish the various Eleventh Amendment issues distinct to each party defendant.

To the extent the Court held that declaratory relief could properly be ordered against the Attorney General, such holding is in error. As explained below in Section 2 of this petition, since the Attorney General has no connection whatsoever with the statute that allegedly violated plaintiffs' rights, plaintiffs' claims against the Attorney General constitute a suit against the State of Missouri. Thus, all of plaintiffs' claims, whether in law or equity, are barred by the Eleventh Amendment. *Ex parte Young*, 209 U.S. at 158 and *Pennhurst*, 465 U.S. at 102, citing *Cory*, 457 U.S. at 91. Further, as explained below in Section 3, even if the Attorney General is an appropriate official to be sued, any declaration that a statute that was fully implemented 5 years ago is unconstitutional would necessarily be retrospective in nature, and in violation of the Eleventh Amendment. *Green*, 474 U.S. at 73.

[9]Though the Court retained jurisdiction over this case awaiting the District Court's findings of fact and conclusions of law, presumably giving it the opportunity to determine later whether the remedies ordered by the District Court against the Attorney General violate the Eleventh Amendment, this in no way ameliorates the harm caused the State of Missouri and the Attorney General in being subjected to defending a trial of plaintiffs' constitutional claims when it is immune, not just from liability but from suit. "[T]he value to the states of their Eleventh Amendment immunity..., is for the most part lost as litigation proceeds past motion practice." *Puerto Rico Aqueduct*, 113 S.Ct. at 688. "The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Id.* at 689, quoting *In re Ayers*, 123 U.S. 443, 505 (1887).

A motion to dismiss on Eleventh Amendment grounds made by a State or its officials involves a claim to a fundamental constitutional protection whose resolution generally has no bearing on the merits of the case. *Puerto Rico Aqueduct,* 113 S.Ct. at 668. The very object and purpose of the Eleventh Amendment immunity is not to provide a defense to liability, but to prevent states from being sued in the first instance. *Id.* at 689. Thus a state or its officials have the right to have the question of immunity determined *before* they are subjected to suit on the merits of any constitutional claim. *Id.* at 688-689. This fundamental entitlement to immunity from suit is effectively lost if a case is erroneously permitted to be tried on the merits. *Id.* at 687. The type of relief granted and against whom such relief is granted are essential elements in determining whether the Eleventh Amendment applies to plaintiffs' claims. Yet the Eighth Circuit's holding is unclear as to what type of relief is appropriate and against whom such relief would be proper under the Eleventh Amendment. Thus this holding subjects the State of Missouri and its Attorney General to litigation on the merits of the underlying constitutional claims without determining whether the Eleventh Amendment would bar such a suit. This in and of itself violates the Eleventh Amendment and is inconsistent with this Court's decision in *Puerto Rico Aqueduct. Id.* at 688-689.

2. The Court of Appeals' opinion directly conflicts with this Court's opinion in *Ex parte Young*, and opinions in other Circuit opinions which hold that in the absence of a sufficient connection between the official sued and enforcement of the allegedly unconstitutional statute, the suit constitutes a suit against the State in violation of the Eleventh Amendment.

As stated above, the Court of Appeals decision reversing the dismissal of plaintiffs' claims against the Attorney General as violative of the Eleventh Amendment wholly neglected to address, much less resolve, the fundamental issue of whether the

Attorney General is sufficiently connected to the enforcement of the statute that allegedly violated plaintiffs' constitutional rights to allow suit consistent with the Eleventh Amendment. If the Court had made this most basic inquiry, it is clear from plaintiffs' complaint that the Attorney General lacks any connection with the enforcement of the statute that allegedly violated their rights. Since this suit against the Attorney General is in all respects a suit against the State of Missouri in violation of the Eleventh Amendment, regardless of the relief sought, it must be dismissed.

The Court of Appeals opinion reversing the District Court's dismissal is in direct conflict with this Court's decision in *Ex parte Young*. In *Ex parte Young*, the Minnesota Attorney General was enforcing unconstitutional transportation rates established by state statute to the penal detriment of plaintiffs while under a contempt order from the District Court. The *Young* Court carved out a very narrow exception to Eleventh Amendment immunity allowing an injunction against the Attorney General to prevent him from pursuing criminal sanctions against the plaintiffs. *Young*, 209 U.S. at 156. It was clear in that case that the Attorney General was statutorily charged with the duty of enforcing the unconstitutional law and thus was the proper party to enjoin. *Id.* at 160-161. In reaching its conclusion that a suit against a State attorney general for prospective injunctive relief does not constitute a suit against the State itself in violation of the Eleventh Amendment, the Court held that "[i]n making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party." *Id.* at 158.

The theory underlying the *Young* exception to immunity is that a state official, when acting pursuant to an unconstitutional law, is "stripped of his official or representative character and is

subjected in his person to the consequences of his individual conduct." *Id.* at 160. This individual action does not "impart to [the official] any immunity from responsibility to the supreme authority of the United States." *Id.* On the other hand, if the official with a sufficient connection with the enforcement of the illegal provision is not properly joined as a defendant,

> then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based on the theory that the former, as the executive of the state, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons.

Id. at 158, quoting *Fitts v. McGhee*, 172 U.S. 516, 530 (1899).

It is clear from the face of plaintiffs' complaint that the Attorney General had no connection with the enforcement of the statute that allegedly violated their constitutional rights. Plaintiffs' complaint fails to allege one fact that indicates that the Attorney General threatened to enforce, enforced, or had any legal authority to enforce the provision in question against plaintiffs. In fact, plaintiffs would be unable to assert any such facts because the Attorney General had no authority, statutory or otherwise, to enforce the statute. Plaintiffs themselves admit that any available injunctive relief should be entered against the PSRS. Pet. App. A-10, ¶ 29. The fact that plaintiffs admit that there is no injunctive relief available against the Attorney General confirms that he has no connection with the enforcement of the statute and that there is absolutely no conduct of his to restrain

or conform to federal law. The Court of Appeals' decision allowing the Attorney General to remain a party to this lawsuit absent any connection with the enforcement of the statutory scheme that allegedly violated plaintiffs' rights effectively allows a suit against the State of Missouri in violation of the Eleventh Amendment. This contradicts not only the holding, but the core policy behind this Court's decision in *Young*.

The Court of Appeals decision also conflicts with decisions in other circuits which have examined the connection necessary to sue a state official in his official capacity consistent with the Eleventh Amendment. The common theme in all these cases is that the official sued must have sufficient connection with the enforcement of the statute that deprives plaintiffs of their constitutional violations or the suit is nothing more than an attempt to sue the State itself in violation of the Eleventh Amendment. *Sherman v. Community Consolidated School District 21 of Wheeling Township*, 980 F.2d 437 (7th Cir. 1992) (claims against the Attorney General dismissed in action challenging constitutionality of state statute requiring recitation of Pledge of Allegiance as a suit against the state in violation of the Eleventh Amendment where Attorney General never threatened plaintiffs with prosecution and had no authority to do so); *Long v. Van de Kamp*, 961 F.2d 151 (9th Cir. 1992) (Eleventh Amendment barred claims against Attorney General because his supervisory powers were not sufficient to establish requisite connection with enforcement of the statute that allegedly deprived plaintiffs of their constitutional rights and there was no threat that statute would be enforced by Attorney General); *Southern Pac. Transp. Co. v. Brown*, 651 F.2d 613 (9th Cir. 1980)(claims against Attorney General constituted claims against the State of Oregon because he did not have "some connection" with the enforcement of the statute); and *Kurz v. State of Michigan*, 548 F.2d 172 (6th Cir. 1977) (claims against Solicitor General constituted claims against the State of Michigan).

Because the Attorney General has not threatened to enforce, has not enforced and has no authority to enforce the statutory provision that allegedly violated plaintiffs' constitutional rights, plaintiffs' claims are in essence a suit against the State of Missouri and should be dismissed regardless of the relief sought. The only benefit to having the Attorney General as a party to this lawsuit is to obtain a judgement binding on the State of Missouri "as an entity, a step that Congress did not authorize when enacting 42 U.S.C. § 1983 and that the eleventh amendment does not permit in the absence of such authorization." *Sherman*, 980 F.2d at 441.

The Eighth Circuit's ruling allowing the Attorney General to remain a party to this lawsuit subjects the State of Missouri to suit. This seriously undermines the fundamental protection of the Eleventh Amendment, and intrudes upon the inviolate principles of federalism inherent in the Eleventh Amendment. *See Puerto Rico Aqueduct*, 113 S.Ct. at 689.

> Despite the narrowness of its terms, [this Court has]...understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty, and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention."

Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991) (internal citations omitted). To so cavalierly dismiss Missouri's claim to immunity is contrary to the importance this Court has placed considerable importance on the Eleventh Amendment and the federalism principles it represents.

3. The Eleventh Amendment bars an action against a State Attorney General in federal court under 42 U.S.C. § 1983 which challenges the constitutionality of a State statute, when the statute was fully implemented years ago and nothing under the statute remains to be enforced.

Assuming the Attorney General is a proper party to this lawsuit (as explained above he is not), plaintiffs' claims against the Attorney General — which seek only retrospective relief — are nonetheless barred by the Eleventh Amendment. In reversing the District Court's dismissal of plaintiffs' claims against the Attorney General, the Court of Appeals relied upon an erroneous characterization of the nature of the alleged constitutional violation and the nature of the relief sought by plaintiffs in denying the Attorney General Eleventh Amendment immunity.

The alleged constitutional violation is not, as the Court of Appeals stated, "ongoing" under any heretofore recognized legal or common sense meaning of that term; rather, it occurred 5 to 7 years ago when refunds were made to certain PSRS members, and not to plaintiffs. As the District Court found, the statute under which those refunds were made has been fully implemented; absolutely nothing remains to be completed. Under decisions of this Court, that type of past alleged unconstitutional action cannot be deemed "ongoing" for purposes of the Eleventh Amendment. Moreover, the only substantive relief plaintiffs have ever sought in this action is a refund of their past contributions. That type of retrospective relief likewise is barred by the Eleventh Amendment.

In the five complaints filed over the four year history of the litigation, plaintiffs have been very clear about the only remedies they seek: a declaration that §104.342 is unconstitutional and an injunction requiring PSRS to refund their past retirement contri-

butions.[10] The Court of Appeals rejected the District Court's finding that these claims against the Attorney General are barred by the Eleventh Amendment, holding that "[i]f the statutory scheme is in fact unconstitutional, the continued implementation of such a scheme constitutes an ongoing violation of federal law." Pet. App. A-25. Under cases decided by this Court,

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[10] In its opinion, the Court of Appeals indicated that "the district court at least could require PSRS to recover the refunds already made pursuant to an unconstitutional scheme." Pet. App. A-25. Plaintiffs have never sought, and have repeatedly disavowed their intention to seek, any order requiring PSRS to recover the refunds already made to thousands of former PSRS members. (To be eligible to receive refunds, these people were required to transfer to MOSERS.) For good reason, that type of relief would be problematic for a number of reasons.

First, this remedy would result in no financial benefit to plaintiffs and would do absolutely nothing to change their legal rights with regard to the PSRS. Additionally, this remedy would raise serious ethical issues for plaintiffs' counsel in that he represented the state employees in the prior District Court cases, the settlement of which resulted in the legislature's passage of the refund scheme at issue in this appeal. Thus this remedy would compromise the potential property interests of his former clients who are not parties to this case. Such a remedy would also impose a tremendous hardship on those thousands of nonparty former PSRS members, who may well have already spent most, if not all, of the refund moneys they received years ago. That remedy itself would raise serious constitutional issues. It thus is hardly surprising that plaintiffs have never requested, plead, or argued for that remedy in over four years of litigation.

Secondly, the PSRS has no legal authority to retrieve the refunds already made. First, the people who already have received refunds are now members of MOSERS and PSRS's authority to adjust benefits for overpayment to its members under Mo. Rev. Stat. § 169.080 (1986) does not extend to members of MOSERS. Additionally, the refunds already given to these former PSRS members were funded by the Missouri legislature. Because the State of Missouri would be the real party in interest in a lawsuit to retrieve the refunds already given, PSRS would not have standing to recover the funds for the State of Missouri. Since the State of Missouri cannot be a party to this lawsuit because of the Eleventh Amendment, *see Pennhurst*, 465 U.S. at 100, this remedy is unavailable to plaintiffs.

plaintiffs' alleged constitutional violation can not be deemed "ongoing" for purposes of the Eleventh Amendment. Because the Eighth Circuit relied on this erroneous characterization of what constitutes "ongoing" in denying the Attorney General Eleventh Amendment immunity, its decision should be reversed.

Though *Ex Parte Young* held that the Eleventh Amendment does not prevent federal courts from ordering prospective injunctive relief against state officials "to prevent a continuing violation of federal law," *Green,* 474 U.S. at 68, citing *Ex Parte Young*, 209 U.S. at 155-56, this Court has explicitly "refused to extend the reasoning of *Young*..., to claims for retrospective relief." *Green*, 474 U.S. at 68. *Young*'s applicability has been tailored to conform to those situations where the violation

> *is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past,* as well as on cases in which the relief against the state official directly ends the violation of federal law as opposed to cases in which that relief is intended indirectly to encourage compliance with federal law through deterrence or directly to meet third-party interests such as compensation.

Papasan, 478 U.S. at 277-78 (emphasis added). This bar against retrospective relief has been extended to prohibit a federal court from issuing a declaratory judgement that a state or state officials violated federal law in the past when there is no ongoing violation of federal law. *Green*, 474 U.S. at 73.

In this case, as the District Court held, "[t]here is simply no ongoing violation of federal law." Pet. App. A-19. The former employees plainly alleged that it is the "implementation and enforcement" of Mo. Rev. Stat. § 104.342 (Supp. 1991) that allegedly violated their constitutional rights. Pet. App. A-8 at ¶ 22. By the express terms of that statute, full implementation

and enforcement of that provision occurred in 1987 and 1989 when the then present employees received refunds of their PSRS contributions. Because the statute that allegedly violated plaintiffs' rights was fully implemented five years ago, there is no future conduct to enjoin, no ongoing violation of federal law, and no valid basis for prospective injunctive relief under *Young*.

Any declaration that the Attorney General acted unconstitutionally in the past would serve no purpose except to allow the former employees to attempt to offer that declaration in the state proceeding (which was filed by plaintiffs on October 15, 1993) as evidence on the issue of liability. The plaintiffs then could claim the only remaining issue for the State court to decide would be the amount of damages. If such a declaratory order were allowed, it "would have the same effect as a full-fledged award of damages or restitution by the federal court." *Green*, 474 U.S. at 73. The Court of Appeals decision, which presumably would allow the District Court to order such a declaration, would constitute the type of end run around the Eleventh Amendment, this Court prohibited in *Green*. *Id.*

As the District Court held, plaintiffs' claim for so called "injunctive relief" is nothing more than a request for a "cash reimbursement of their contributions because they allege the state violated their constitutional rights in the past when it did not grant them refunds. This request amounts to a retroactive damage award which is barred by the Eleventh Amendment." Pet.App. A-20.

The policy underlying the *Young* exception to immunity is to balance the necessity to insure that State officials comply with federal law with the fundamental right of a State and its officials to be free from suit in federal court. See *Puerto Rico Aqueduct*, 113 S.Ct. at 688-89, and *Papasan*, 474 U.S. at 278. This Court has concluded the line between prospective and retrospective relief is the appropriate one to use in reconciling these competing

constitutional concerns. *Papasan*, 474 U.S at 277-79. Compensatory or deterrence interests to vindicate a past violation of federal law are not sufficient to overcome the dictates of the Eleventh Amendment, and do not serve the policy underlying the *Young* exception to immunity. *Id* at 278, citing *Green*, 474 U.S. at 68.

Plaintiffs' request for so-called "injunctive" relief in this case is exactly the type of retrospective relief this Court in *Edelman* held was barred by the Eleventh Amendment. The *Edelman* plaintiffs requested an injunction to require state officials to remit public aid unconstitutionally withheld. 415 U.S. at 656. The Court in *Edelman* held that even though the request was "phrased" as a request for prospective injunctive relief, it was in practical effect indistinguishable from a retroactive award of damages against the State which is prohibited by the Eleventh Amendment. *Id.* at 668. Plaintiffs' request for the release of their public aid benefits illegally withheld was not a request for a valid injunction to ensure future compliance with federal law. Their request, which was "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials " was in reality a request for a retrospective damage award in violation of the Eleventh Amendment. *Id.*

Plaintiffs' request for an order enjoining defendants to refund all their PSRS contributions is indistinguishable from the relief prohibited in *Edelman*. The relief requested in *Edelman* and the relief requested here is not remedial, designed to prevent future alleged constitutional violations, but is a compensatory remedy measured in terms of an alleged past breach of duty. It is their exclusion from the refund scheme that is plaintiffs' grievance. The time to prevent the alleged violation of federal law with a valid prospective injunction was before the refunds were given to the thousands of PSRS members to the exclusion of plaintiffs. That time has long since passed and any attempt to redress plaintiffs' claims would necessarily be retrospective.

Plaintiffs attempt to plead a continuing wrong to justify "injunctive relief" by alleging that the PSRS is refusing to refund plaintiffs' contributions (There is no allegation that the Attorney General is withholding plaintiffs' contributions; any such allegation would be frivolous as it is clear he has no power to do so.). Pet. App. A-10 - A-11. This attempt to phrase the request for damages as a request to enjoin the PSRS to release refunds of plaintiffs' contribution is the exact type of maneuver the Court in *Edelman* held violative of the Eleventh Amendment. *Edelman*, 415 U.S. at 668.

This Court in *Papasan v. Allain*, 478 U.S. at 280, reiterated the same point. The *Papasan* plaintiffs claimed that a past distribution of certain trust funds by the State of Mississippi violated the Equal Protection Clause and sought to have the trust corpus funds replaced. *Id.* To attempt to avoid *Edelman's* holding, the *Papasan* plaintiffs characterized their claim as seeking prospective, injunctive relief to prohibit a continuing violation of federal law. *Id.* In ruling that the Eleventh Amendment barred such a claim, this Court relied upon the obvious similarity of that claim to the claim presented in Edelman:

> The characterization in [*Edelman*] of the legal wrong as the continuing withholding of accrued benefits is very similar to the petitioners' characterization of the legal wrong here as the breach of a continuing obligation to comply with the trust obligations. ***We discern no substantive difference between a not-yet-extinguished liability for a past breach of trust and the continuing obligation to meet trust responsibilities asserted by the petitioners.***

Papasan, 478 U.S. at 280. (emphasis added)

Here, as in *Papasan*, there is no constitutionally significant distinction between the alleged "not-yet-extinguished liability" for the past, allegedly unconstitutional, distribution of refunds and the supposed "continuing obligation" to provide equal

refunds. Thus, regardless of semantics, plaintiffs' claims are barred under both *Edelman* and *Papasan*.[11]

The Eighth Circuit's opinion obliterates the distinction between retrospective and prospective relief carefully crafted by this Court's opinions. If left to stand, it undoubtedly will lead to an avalanche of federal court cases challenging the constitutionality of state actions that were taken and completed in the past, cases which heretofore were plainly barred by the Eleventh Amendment. States have a strong and constitutionally legitimate interest in not being hauled into federal court for alleged actions that were fully completed long before a lawsuit was filed. This Court should accept this Petition to reaffirm this fundamental principle.

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[11] The Court in *Papasan* went on to rule that plaintiffs' additional claim that there was a "present disparity in the distribution of the benefits of state-held assets" was not barred by the Eleventh Amendment. 478 U.S. at 281-82. Here, plaintiffs cannot allege that there is any continuing disparity with respect to distribution of refunds; as pointed out above, all refund distributions have already been completed and no more remain to be made. Thus, this latter holding in *Papasan* is inapplicable here.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted by this Honorable Court.

Respectfully Submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Case No. 90-4207-CV-C-5

HAROLD LYNCH, TURNER TYSON,
CHARLES F. HENRY, JACK BITZENBURG,
and GEORGE A. DERRIEUX,
Plaintiffs,

and

JEAN DICKEY, GREGORY DICKEY,
RICHARD FLANAGAN, FRANKLIN HOGGARD,
MILFORD HOLT, and JAMES MENTIS,
Intervenor Plaintiffs,

vs.

THE PUBLIC SCHOOL RETIREMENT
SYSTEM OF MISSOURI; AND
JEREMIAH W. (JAY) NIXON,
Attorney General of the State of Missouri,
in his official capacity and in
his statutory capacity,
Defendants.

FOURTH AMENDED COMPLAINT

[Filed April 28, 1993]

Come now Plaintiffs and Intervenor Plaintiffs (hereinafter referred to collectively as "Plaintiffs") and for their cause of action state as follows:

COUNT I — Declaratory Judgment

1. Plaintiffs bring Count I of this cause of action pursuant to 28 U.S.C. §2201 for a judgment declaring portions of Chapters 104 and 169 of the Revised Statutes of Missouri ("RSMo") (1991 Supp.) to be unconstitutional; and pursuant to 28 U.S.C. §1343, for deprivations, under color of state law, of rights secured to Plaintiffs by the United States Constitution, actionable under the Civil Rights Act of 1871, 42 U.S.C. §1983 and §1988.

2. The violation of Plaintiffs' rights as alleged herein was committed within the State of Missouri, and venue lies in the Central Division of the United States District Court for the Western District of Missouri.

3. Plaintiffs are, and at all times relevant to this action were, citizens of the United States.

4. Plaintiffs, and each of them, were employed by the State of Missouri, prior to December 31, 1989, with one or more of the following entities: Department of Elementary and Secondary Education ("DESE"), Southwest Missouri State University ("SMSU"), Southeast Missouri State University ("SEMSU"), Central Missouri State University ("CMSU"), Northwest Missouri State University ("NWMSU"), Northeast Missouri State University ("NEMSU"), Harris-Stowe State College ("HSSC"), Missouri Southern State College ("MSSC"), Missouri Western State College ("MWSC"), Department of Corrections and Human Resources ("DCHR"), Department of Mental Health ("DMH"), Department of Social Services ("DSS"), and the Division of Youth Services ("DYS"); and while so employed personally contributed to The Public School Retirement System of Missouri ("PSRS"), established under Chapter 169 RSMo.

5. This action is brought pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of the individually named

Plaintiffs and on behalf of all other persons similarly situated as former employees of the State of Missouri who participated in PSRS, with said class being more specifically set forth below. Said persons are so numerous as to make it impractical to bring them all before the court.

6. There are common questions of law and fact presented herein, and Plaintiffs' claims as hereinafter set forth are typical of the claims of all members of the overall class. Plaintiffs are qualified to and will fairly and adequately represent and protect the interest of each and all members of the class.

7. The class consists of Subclass A and Subclass B. *Subclass A* consists of all those persons who: (a) are retired employees who were employed by the State of Missouri prior to December 31, 1989; (b) have contributed to PSRS; (c) have not been refunded their personal retirement contributions; and (d) *have commenced* receiving retirement benefits from PSRS prior to January 1, 1990. *Subclass B* consists of all those persons who: (a) were employed by the State of Missouri prior to June 14, 1989; (b) have contributed to PSRS; (c) have not been refunded their personal retirement contributions; and (d) *have not commenced* receiving retirement benefits from PSRS prior to January 1, 1990. Unless otherwise specified, the term "Plaintiffs" as used herein shall collectively refer to all members of both Subclasses.

8. Subclass A class representatives are:

Ms. Jean Dickey
Southeast Missouri State University
1110 Broadridge
Jackson, MO 63755

Mr. Gregory Dickey
1510 Route D
Jackson, MO 63755

Mr. James Mentis
Route #2, Box 68
Strafford, MO 65757

Mr. Richard Flanagan
315-B West 3rd Street
Maryville, MO 64468

Mr. Franklin Hoggard
415 East Cardinal
Springfield, MO 65810

Mr. Milford Holt
1814 Ricardo Drive
Cape Girardeau, MO 63701

9. Class representatives for Subclass B are:

Mr. Harold Lynch, Director
Nichols Career Center
609 Union Street
Jefferson City, MO 65101

Mr. Turner Tyson
Assistant Superintendent
Jefferson City Public School District
315 East Dunklin Street
Jefferson City, MO 65101

Mr. Charles F. Henry
Director of High Tech. Training
Metropolitan Community Colleges
3200 Broadway
Kansas City, MO 64111

Mr. Jack Bitzenburg
Dean, Continuing Education
Penn Valley Community College
3201 Southwest Trafficway
Kansas City, MO 64111

Mr. George A. Derrieux
Assistant Superintendent
Hannibal 60 School District
4650 McMasters Avenue
Hannibal, MO 63401

10. Defendant Jeremiah W. (Jay) Nixon is the Attorney General of the State of Missouri and maintains his official office at the permanent seat of government in Jefferson City, Cole County, Missouri. Defendant Nixon has the powers and duties provided by the Constitution and laws of the State of Missouri. Defendant Nixon is made a party hereto in his official capacity and in his statutory capacity.

11. PSRS was specifically established as a retirement system for all public school teachers in Missouri, as defined in §169.010(16), RSMo.

12. The Missouri State Employees Retirement System ("MOSERS") was established as a retirement system for all State employees.

13. Both PSRS and MOSERS were originally set up as contributory systems, meaning that each employee personally contributed a percentage of their salary to fund their retirement plan. MOSERS is now a non-contributory retirement system, with the State of Missouri making the full contribution for all State employees who are members. PSRS is now a non-contributory retirement system for those members who are currently employed by the State, and has been non-contributory with regard to some former State employees.

14. Plaintiffs were and are similarly situated to all other employees of the State of Missouri, but are the only such persons who have neither been allowed to withdraw the personal contributions they made to their retirement system while employed by the State nor received an automatic refund of such personal contributions while remaining a member of their respective retirement system. With the exception of the Plaintiffs, all other current, former, retired and even deceased State employees have received a refund of their personal contributions made to their retirement system, plus interest, and have been allowed to remain members of their respective retirement system.

15. Plaintiffs are former employees of the State of Missouri who are members of PSRS. While Plaintiffs were employed by the State, they were arbitrarily assigned to and required to participate in and personally contribute to PSRS for their retirement. All other State employees were either not required to personally contribute to their retirement or, if they made personal contributions, were subsequently refunded their personal contributions.

16. On or about April 2, 1986, in the Western District of Missouri, United States District Court Case No. 84-4331-CV-C-5, styled *Sommer v. Bihr*, 631 F.Supp. 1388, the defendants there (including the Board of Trustees of PSRS and the Executive Secretary of PSRS) were held to be violating the equal protection clause of the Fourteenth Amendment to the United States Constitution by requiring certain State employees within the Department of Corrections and Department of Mental Health to participate in the PSRS on an employee-contributory basis as opposed to having their pension benefits fully funded by their employer, as was being enjoyed by other State employees within those departments. The defendants were ordered, amongst other things, to refund all of the personal contributions of those plaintiffs to the retirement fund, with interest at the rate of six percent (6%). The decision was not appealed, and is binding

upon the Board of Trustees of PSRS and the Executive Secretary of PSRS in this action, through operation of the doctrines of *res judicata* and collateral estoppel.

17. In 1986, and subsequent to the decision in *Sommer v. Bihr*, the Missouri General Assembly ("Legislature") enacted House Bill 1496. This bill implemented the *Sommer* decision, not only for State employees within the Department of Corrections and Human Resources and the Department of Mental Health, but also for State employees within the Division of Youth Services and the Department of Social Services. The legislation specifically granted to all those State employees the right to receive a refund of all their previously paid retirement contributions, with interest.

18. In 1987, the Legislature enacted H.B. 713, which provided that employees of SMSU, SEMSU, CMSU, NWMSU, NEMSU, HSSC, MSSC, and MWSC, who were members of PSRS would receive a refund of their personal contributions, plus interest.

19. In 1989, the Legislature passed House Bill 610. This legislation was passed in part to effectuate the settlement of *Paul K. Johnson, et. al. v. David Mustoe, et. al.*, United States District Court, Western District of Missouri, Central Division, Case No. 87-4290-CV-C-9, consolidated with No. 87-4299-CV-C-9. This legislation enacted § 104.342.7(1) RSMo (1991 Supp.), allowing a refund (with "interest of at least 6%") to persons who: (a) were employed by DESE, SMSU, SEMSU, CMSU, NWMSU, NEMSU, HSSC, MSSC, and MWSC on June 14, 1989; (b) were contributing to PSRS; (c) elected to transfer to MOSERS; and (d) did not commence receiving retirement benefits prior to January 1, 1990. This legislation also enacted §104.342.7(2) RSMo, *allowing persons who elected to stay in PSRS the same refund* as was provided in §104.342.7(1) RSMo. The retirement benefits of the refund recipients were not limited by reason of the refund allowed under either of these provisions. Plaintiffs in the present

case were members of PSRS who had been employed by the employers listed above, but were not so employed on June 14, 1989.

20. House Bill 610 also enacted §169.055.8 RSMo (1991 Supp.), allowing former employees of CMSU, who had not yet retired, the option of transferring to MOSERS or remaining in PSRS, and allowing them a refund (with "interest of at least 6%") in either event. This legislation also enacted § 169.055.10 RSMo, allowing former employees of CMSU, who had retired under PSRS, the option of transferring to MOSERS or remaining in PSRS, and allowing them a refund (with "interest of at least 6%") in either event.

21. Plaintiffs have been denied a refund of all their personally contributed funds in violation of their equal protection rights. Other employees of the State of Missouri, who were similarly situated to Plaintiffs and who performed duties identical to those performed by Plaintiffs when they were employed by the State of Missouri, have received refunds of their personal contributions, even if they remained members of PSRS. Plaintiffs were and are similarly situated to those employees of the State of Missouri to whom H.B. 610 applied, but are the only such persons who have not been allowed a refund of their contributions to their retirement system, with interest.

22. The implementation and enforcement of the provisions of Chapter 104, and specifically §104.342 RSMo (1991 Supp.), causes the Plaintiffs to be denied a refund for any of their retirement contributions made while they were employed by the State. Such treatment of Plaintiffs, and members of their class, is arbitrary and capricious and bears no rational relationship to any legitimate State interest or purpose.

23. Previous orders of this Court and laws enacted by the Legislature have established and acknowledged that equal protection rights were violated when certain State employees were

required to participate in a contributory retirement system while other State employees were allowed to participate in non-contributory plans. Those previous court orders and State legislative enactments sought to correct the discrepancies that existed where one group of State employees was required to personally contribute to their retirement, while other similarly situated State employees were not required to make such personal contributions. Refunds of previously made personal contributions were mandated under the court orders and corrective legislation.

24. A justiciable controversy exists between the parties hereto. All others similarly situated to Plaintiffs, and their class members, have had their rights restored to them by final orders of this Court or by legislation passed by the Legislature, while Plaintiffs' rights remain without redress.

25. No reasonable or rational relationship to any legitimate State interest presently exists for the unequal and disparate treatment arbitrarily imposed on Plaintiffs, as compared to other identically situated State employees, who have been refunded their personal contributions along with appropriate interest.

26. By virtue of §169.060 RSMo (1991 Supp.), Plaintiffs have a protectable property interest, in that they are entitled to retirement benefits. Plaintiffs have been required to make personal contributions in order to receive such benefits, which moneys are now retained by Defendants. Plaintiffs are the only persons who have not had their personal contributions returned to them, and such retention by Defendants amounts to a taking without due process of law, in violation of the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution.

WHEREFORE, Plaintiffs pray the Court to grant to them the following relief:

A. A declaratory judgment that §104.342 RSMo. (1991 Supp.), either on its face or as applied to Plaintiffs, or both, violates the Equal Protection Clause of the Fourteenth Amendment in that certain property rights and privileges afforded all other State employees were not afforded to Plaintiffs; and further results in a "taking" of Plaintiffs' property without due process of law in violation of the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution.

B. An order awarding Plaintiffs their attorneys fees, expenses of litigation and costs herein; and

C. Such other and further relief as may be just and proper in the premises.

COUNT II —Injunctive relief

27. Plaintiffs bring Count II of this cause of action pursuant to 28 U.S.C. §2202, for further relief; and pursuant to 28 U.S.C. §1343, for deprivations under color of state law, of rights secured to Plaintiffs by the United State Constitution, actionable under the Civil Rights Act of 1871, 42 U.S.C. §1983 and §1988.

28. Plaintiffs incorporate by reference, as though fully set forth herein, the allegations contained in paragraphs 2 through 26 of this Complaint.

29. Defendant The Public School Retirement System of Missouri ("PSRS") holds the personal retirement contributions of the Plaintiffs, and is a proper party to this action, pursuant to §169.020.1 RSMo. (1991 Supp.). Any available injunctive relief must be entered against this Defendant. Defendant PSRS can be served with process by service upon David W. Mustoe, Executive Secretary, at 701 West Main Street, Jefferson City, Missouri.

30. Defendants contend that §104.342 RSMo (1991 Supp.) is constitutional on its face and in their application of it, and insist that they will continue to enforce it to the detriment of Plaintiffs.

31. Plaintiffs have no adequate remedy at law for these deprivations of their rights and have sustained substantial and continuing losses and deprivations.

32. To properly remedy the disparate treatment of Plaintiffs, and the taking of Plaintiffs' property, Plaintiffs must be allowed to withdraw all of their past personal contributions to PSRS that were made while Plaintiffs were State employees, with interest, and allowed to receive full retirement benefits upon retirement, without any limitation of benefits as a result of such refund of personal contributions.

33. The funds which Plaintiffs are requesting to be returned are neither funds of the State of Missouri nor funds in the State treasury. These funds are personal contributions and accrued interest on moneys paid into PSRS solely by Plaintiffs. Plaintiffs are not asking the State for money, nor are they asking for an appropriation to replace the funds in PSRS that Plaintiff claim are rightfully theirs. A common fund made up totally and wholly of the Plaintiffs' money is the subject of this litigation and its proposed remedies.

WHEREFORE, Plaintiffs pray the Court to grant to them the following relief:

A. An order enjoining Defendants from maintaining and implementing The Public School Retirement System in a manner which violates the Equal Protection Clause;

B. An order that all personal contributions made by Plaintiffs and members of their class to PSRS while employees of the State of Missouri be refunded to them (with interest of at least 6%), and that Plaintiffs' retirement benefits shall not be limited by reason of such refund of personal contributions;

C. An order enjoining enforcement against Plaintiffs of that portion of §169.050.5 RSMo. which, in the event that all of the §104.342 RSMo is declared unconstitutional, would cause Plain-

tiffs to forfeit any creditable service they may have if their contributions are refunded.

D. Retention of jurisdiction by the Court until its orders have been properly implemented;

E. An order awarding Plaintiffs their attorneys fees, expenses of litigation and costs herein; and

F. Such other and further relief as may be just and proper in the premises, including but not limited to such relief as the Court may find appropriate and necessary to restore Plaintiffs to their full rights and privileges.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was sent by first-class mail, postage prepaid to: Mr. Jay Nixon, Attorney General, P. O. Box 899, Jefferson City, MO 65102, and to Mr. Philip A. Klawuhn, Armstrong, Teasdale, Schafly, Davis & Dicus, 1700 City Centre Square, 1100 Main Street, Kansas City, MO 64105, on this 28th day of April, 1993.

By /s/ Roger G. Brown

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 90-4207-CV-C-5

HAROLD LYNCH, et al.,
Plaintiffs,

and

JEAN DICKEY, et al.,
Intervenor Plaintiffs,

vs.

THE PUBLIC SCHOOL RETIREMENT
SYSTEM OF MISSOURI, et al.,
Defendants.

MOTION TO DISMISS FOURTH AMENDED COMPLAINT OF DEFENDANT JEREMIAH W. (JAY) NIXON, MISSOURI ATTORNEY GENERAL

[Filed: June 04, 1993]

Separate defendant Jeremiah W. (Jay) Nixon, Attorney General of the State of Missouri ("Attorney General") hereby moves, pursuant to Rule 12(b), Federal Rules of Civil Procedure, for an Order of Dismissal of Plaintiffs' Fourth Amended Complaint as to this separate defendant on the following grounds:

1. Plaintiffs Fourth Amended Complaint fails to present a case or controversy; therefore this Court lacks jurisdiction under Article III of the United States Constitution.

2. The Eleventh Amendment to the United States Constitution prohibits this suit against the Attorney General of Missouri.

3. Plaintiffs' complaint fails to state a claim for which relief can be granted.

a. Plaintiffs' complaint fails to state a cause of action under 42 U.S.C. § 1983 because the Attorney General is not a "person" under that section.

b. Plaintiffs have failed to show a deprivation of a substantive or procedural due process under the Fifth and Fourteenth Amendments to the United States Constitution.

c. Plaintiffs' complaint fails to state a claim for the denial of equal protection under the Fourteenth Amendment to the United States Constitution.

4. For its further reasons and authorities in support of this Motion, the Attorney General incorporates herein by this reference its Memorandum of Law in Support of this Motion filed contemporaneously herewith.

WHEREFORE, defendant the Attorney General prays the Court enter its Order dismissing with prejudice the Fourth Amended Complaint as to this defendant, that the Attorney General be discharged herefrom with his costs herein expended and incurred and for such further relief as the Court may deem just.

Respectfully submitted,

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Attorney General

/s/ Don Downing
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was mailed, postage prepaid, by United States mail, this 4th day of June, 1993, to:

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 90-4207-CV-C-5

HAROLD LYNCH, et al.,
Plaintiffs,

and

JEAN DICKEY, et al.,
Intervenor Plaintiffs,

vs.

THE PUBLIC SCHOOL RETIREMENT
SYSTEM OF MISSOURI, et al.,
Defendants.

ORDER

[Filed August 20, 1993]

Before the Court are separate motions to dismiss plaintiffs' Fourth Amended Complaint by defendant Jeremiah Nixon ("the Attorney General") and by defendant Public School Retirement System ("PSRS"). For the following reasons, both motions to dismiss are granted.

On April 5, 1993, this Court granted summary judgment in favor of all defendants and gave plaintiffs leave to file an amended complaint naming the Missouri Attorney General as a defendant. Plaintiffs filed their Fourth Amended Complaint on April 28, 1993. Count I seeks a judgment declaring that Mo. Rev. Stat. § 104.342 violates the Equal Protection Clause of the Fourteenth Amendment and results in a "taking" of plaintiffs' property without due process of law in violation of the due

process clause of the Fifth Amendment. Count II seeks injunctive relief against PSRS, ordering it to provide refunds of "all of [plaintiffs'] past personal contributions to PSRS that were made while plaintiffs were state employees, with interest, and [that plaintiffs be] allowed to receive full [PSRS] retirement benefits upon retirement."

This Court's April 5, 1993 Order removed PSRS as a party. Because that Order stands as law of the case, PSRS's motion to dismiss plaintiffs' Fourth Amended Complaint is granted.

This Court concludes that plaintiffs' allegations against the Attorney General are barred by the Eleventh Amendment because plaintiffs do not seek prospective relief. Generally, a suit brought against a state or a state agency is proscribed by the Eleventh Amendment. *Papasan v. Allain*, 106. S.Ct. 900, 907-08. However, a state official who violates the United States Constitution acts without state authority and is subject to suit. *Ex Parte Young*, 28 S.Ct. 441, 453-54 (1908). A state official who enforces an unconstitutional statue falls under this rubric, and a court may enjoin the official from future enforcement of the statute. Courts may also award a wide range of prospective relief, even if the relief has a "substantial ancillary effect on the state treasury." *Edelman v. Jordan*, 94 S.Ct. 1347, 1357-58 (1974); *Nix v. Norman*, 879 F.2d 429, 432 (8th Cir. 1989). Plaintiff may sue a state agent in his or her official capacity if she seeks only injunctive or prospective relief for a legally cognizable claim. *Nix, Id.* Furthermore, state officials sued in their official capacities for injunctive relief are "persons" under § 1983 because official capacity suits for prospective relief are not considered suits against the state. *Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304, 2311 n.10 (1989).

Here, the relief sought by plaintiffs is retroactive in nature. There is simply no ongoing violation of federal law. Any alleged violation of federal law occurred in 1987 and 1989 when the then

present state employees received refunds of their pension contributions to the exclusion of plaintiffs under § 104.342. As the Attorney General notes, the refund scheme was fully completed in 1987 and 1989. The Attorney General does not continue to enforce the statute because it has already been fully implemented. This Court may not issue a declaratory judgment finding that the state or state official violated federal law in the past when there is no ongoing violation of federal law. *Green v. Mansour*, 106 S.Ct. 423, 438 (1985). Plaintiffs seek a cash reimbursement of their contributions because they allege the state violated their constitutional rights in the past when it did not grant them refunds. This request amounts to a retroactive damage award which is barred by the Eleventh Amendment. *See*, *Edelman*, 94 S.Ct. at 1358.

Accordingly, it is hereby

ORDERED that defendant Public School Retirement System's motion to dismiss is granted. It is further

ORDERED that defendant Jeremiah Nixon's motion to dismiss is granted.

/s/ Scott O. Wright
SCOTT O. WRIGHT
Senior United States District Judge
August 20, 1993

APPENDIX D

-UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3357

Harold Lynch; Turner Tyson;
Charles F. Henry; Jack Bitzenburg;
George A. Derrieux;

Plaintiffs-Appellants

Nancy Samp; Bob Chapman;
William K. Goodrick; Donald
Kelly; Larry Lutz;

Plaintiffs;

Jean Dickey; F. Gregory
Dickey; James Mentis; Richard
Flanagan; Franklin Hoggard;
Milford Holt;

Intervenor-Plaintiffs, Below-Appellants;

v.

Public School Retirement
System of Missouri, Board of Trustees;

Defendant-Appellee;

Billy H. Blankenship; Joseph
Rhoads; Deborah Scanlon;

Intervenor-Plaintiffs Below;

William M. Brent, Chairman,
Board of Trustees, individually
and in his official capacity;
Laurel S. Cochennet, Member,
Board of Trustees,
individually and in her official capacity;
Theresa Reger; William J. Wasson, Board
of Trustees, individually and

in his official capacity;
David W. Mustoe, Executive
Secretary, Board of Trustees,
individually and in his
official capacity;
Defendants;
Jeremiah W. (Jay) Nixon;
Defendant-Appellee.

Appeal From the United States District Court
for theWestern District of Missouri

Submitted: May 12, 1994
Filed: June 20, 1994

Before BOWMAN, Circuit Judge, HEANEY, Senior Circuit Judge, and BEAM, Circuit Judge.

HEANEY, Senior Circuit Judge.

Former state employees who contributed to the Public School Retirement System of Missouri (PSRS) brought a class action under 42 U.S.C. § 1983 challenging a statutory scheme under which they are denied refunds of their personal retirement contributions while other persons allegedly similarly situated have received such refunds. The district court dismissed the former employees' complaint, holding that PSRS, its trustees, and its executive secretary were not proper defendants and that plaintiffs' claim was barred by the Eleventh Amendment because they were seeking retroactive relief. We reverse and remand for a determination of whether the statutory provisions violate equal protection or amount to an unconstitutional taking of property.

This matter is before the court for the second time. It was first here on an appeal from a district court order denying without prejudice

the PSRS defendants' motion for judgment on qualified and Eleventh Amendment immunity grounds and allowing discovery on all issues. *Lynch v. Public School Retirement System*, No. 92-3484 (8th Cir. Jan. 6, 1993). We determined that we had "jurisdiction to review a discovery order that is issued before motions asserting immunity are conclusively resolved, but does not limit discovery to the issue of immunity." *Id.* at 3. We remanded with instructions to resolve the issue of defendants' immunity to suit before allowing discovery to proceed as to other issues.

On remand the district court granted summary judgment to the PSRS defendants but directed the clerk not to enter judgment at that time. *Lynch v. Public School Retirement System*, No. 90-4207-CV-C-5, sli p op. at 8 (W.D.Mo. Apr. 5, 1993). The court granted judgment on the ground that the plaintiffs had not sued the parties who allegedly violated their constitutional rights. *Id.* at 7. It reasoned that because the plaintiffs implicitly sought to have portions of Mo. Rev. Stat. § 104.342 declared unconstitutional, plaintiffs must sue the Missouri Attorney General in his official capacity for an injunction prohibiting future implementation of the statute. The court stated that PSRS "could not grant refunds to the plaintiffs without legislation directing them to do so. These defendants did not decide to refuse refunds to these plaintiffs; the General Assembly made that decision. Only the General Assembly can show that it had a rational basis for that decision." *Id.* at 7-8. The court granted the plaintiffs twenty-five days to file an amended complaint "nam[ing] the proper defendants." *Id.* at 8.

The plaintiffs subsequently filed a fourth amended complaint adding the Missouri Attorney General as a defendant. The plaintiffs sought a declaratory judgment that portions of chapters 104 and 169 of Missouri Revised Statutes violate equal protection and result in a taking of plaintiffs' property without due process of law in violation of the Fifth and Fourteenth Amendments. Plaintiffs also sought injunctive relief to prohibit defendants from maintaining and

implementing the retirement system in a manner that violates the Equal Protection Clause; require PSRS to refund to plaintiffs their past personal contributions to the retirement system, with interest; prohibit enforcement against plaintiffs of the portion of section 169.050.5 which, in the event that all of section 104.342 is declared unconstitutional, would cause them to forfeit any creditable service they may have if their contributions are refunded; and such other relief as may be appropriate.

The district court subsequently granted separate motions by the Attorney General and PSRS to dismiss the fourth amended complaint. *Lynch v. Public School Retirement System*, No. 90-4207-CV-C-5 (W.D. Mo. Aug. 20, 1993). The court first held that its April 5, 1993, order had removed PSRS as a party and that the order stood as law of the case; the court thus granted PSRS's motion to dismiss. The court then granted the Attorney General's motion to dismiss, concluding that the Eleventh Amendment barred plaintiffs' claims because they were seeking retroactive rather than prospective relief:

> This Court may not issue a declaratory judgment finding that the state or state official violated federal law in the past when there is no ongoing violation of federal law. Plaintiffs seek a cash reimbursement of their contributions because they allege the state violated their constitution rights in the past when it did not grant them refunds. This request amounts to a retroactive damage award which is barred by the Eleventh Amendment.

Id. at 3 (internal citations omitted).

We do not agree with the district court that PSRS had previously been dismissed from the case and that this action was law of the case. The district court's April 5, 1993, order specifically directed the clerk of court "*not* to enter judgement at this time" (emphasis in original). Judgment on this issue was not entered until the August 20, 1993, order, which was timely appealed by

the plaintiffs. Thus the issue as to whether summary judgment was appropriately granted as to PSRS is properly before us.

We conclude that summary judgment in favor of PSRS and the Attorney General was not appropriate. The district court gave two reasons for its decision, neither of which withstands scrutiny. The first was that even if the challenged statutory provisions were found to violate the Equal Protection Clause, PSRS lacked authority to refund the plaintiffs' personal retirement contributions. The court reasoned that only the legislature could require such refunds. The plaintiffs, however, not only sought refunds but alternatively requested any other relief that might be appropriate. Under the latter alternative, the district court at least could require PSRS to recover the refunds already made pursuant to an unconstitutional scheme.

The district court's second reason was that the Eleventh Amendment bars relief because plaintiffs seek retroactive rather than prospective relief. *See Green v. Mansour*, 474 U.S. 64 (1985). We disagree. If the statutory scheme is in fact unconstitutional, the continued implementation of such a scheme constitutes an ongoing violation of federal law, regardless of whether some or all persons similarly situated to plaintiffs have already received their refunds.

At this time we need not determine the outer limits of the district court's authority to order particular remedies, such as refunds to the plaintiffs.[1] It is sufficient for now to say that the district court clearly has the authority to find the statutory scheme unconstitutional and to order an appropriate remedy.

---

[1]We note, for example, that in *Sommer v. Bihr*, 631 F. Supp. 1388 (W.D.Mo. 1986), the district court ordered refunds of personal retirement contributions to employees of the Departments of Corrections and Mental Health after concluding that statutory provisions requiring those employees to participate in a contributory retirement system violated equal protection when other similarly situated employees participated in a noncontributory retirement system.

The fighting issue in this case has been and continues to be whether there is a rational basis for excluding the plaintiffs from the benefits of amendments to chapters 104 and 169 of Missouri Revised Statutes that permitted some present and past employees to obtain refunds of their personal retirement contributions. The legislation can only be declared unconstitutional under the Equal Protection Clause of the Fourteenth Amendment if there is no rational basis for distinguishing between the plaintiffs and other past and present employees who have received refunds of their personal retirement contributions. *See Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668, (1981). In determining the answer, the court must decide whether the challenged legislation has a legitimate purpose and whether it was reasonable for lawmakers to believe that use of the challenged classification would promote that purpose. *Id.*

We reverse the dismissal of the plaintiffs' complaint and remand for an evidentiary hearing. The district court shall make findings of fact and conclusions of law on whether there is a rational basis for the challenged statutory scheme and whether an unconstitutional taking of property occurred. We retain jurisdiction over this case and direct the district court to certify its findings to this court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3357WMJC

Harold Lynch, et al.,
Appellants,

v.

Public School Retirement System
of Missouri, etc., et al.,
Appellees.

Order Denying Petition for Rehearing and
Suggestion For Rehearing En Banc

The suggestions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied.

Judge Hansen took no part in the consideration or decision of this case.

August 11, 1994

Order Entered at the Direction of the Court:
/s/Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
DEC 5 1994
OFFICE OF THE CLERK

Nos. 94-815 and 94-899

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

THE PUBLIC SCHOOL RETIREMENT SYSTEM OF MISSOURI, AND JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI,
Petitioners,
v.
HAROLD LYNCH, *et al.*,
Respondents.

On Petition for a Writ of *Certiorari* to the
United States Court of Appeals
for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Attorneys for Respondents
*Counsel of Record

COUNTER STATEMENT OF THE QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS FOLLOWED THE SUBSTANTIVE LAW IN DETERMINING THAT PSRS IS NOT ENTITLED TO ELEVENTH AMENDMENT IMMUNITY?

II. WHETHER THE COURT OF APPEALS FOLLOWED THE SUBSTANTIVE LAW IN DETERMINING THAT MISSOURI'S ATTORNEY GENERAL IS NOT ENTITLED TO ELEVENTH AMENDMENT IMMUNITY IN AN ACTION SEEKING TO HAVE MISSOURI STATUTES DECLARED UNCONSTITUTIONAL?

PARTIES TO THIS PROCEEDING

Supplementing Petitioner Nixon's statement of Parties, Respondents state that they are all members of a class, certified on April 23, 1991 by the Honorable Scott O. Wright. Said class has been divided into two subclasses: (1) Subclass A consists of all persons who were employed by the State of Missouri prior to December 31, 1989; who have contributed to the Missouri Public School Retirement System; who have not been refunded their personal retirement contributions; and who have commenced receiving retirement benefits from the Missouri Public School Retirement System prior to January 1, 1990. (2) Subclass B consists of all persons employed by the State of Missouri prior to June 14, 1989; who have contributed to the Missouri Public School Retirement System; who have not been refunded their personal retirement contributions; and who have not commenced receiving retirement benefits from the Missouri Public School Retirement System prior to January 1, 1990.

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Nos. 94-815 and 94-899

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

THE PUBLIC SCHOOL RETIREMENT SYSTEM OF MISSOURI, AND JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI,
Petitioners,
v.
HAROLD LYNCH, *et al.*,
Respondents.

On Petition for a Writ of *Certiorari* to the
United States Court of Appeals
for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case. That opinion is reported as Lynch v. Public School Retirement System of Missouri, 27 F.3d 336 (8th Cir. 1994). Respondents incorporate by reference the statement of facts set forth in said opinion. As further statement of the case, Respondents are compelled to clarify and correct some serious inaccuracies in and omissions from the petitions.

Not every person who received a refund of their personal contributions from The Public School Retirement System of Missouri ("PSRS") under the challenged statutory scheme was required to transfer to the Missouri State Employees Retirement System ("MOSERS"). Petitioners have repeatedly misstated the facts in this regard to the courts at every level -- the simple truth is that some PSRS members were given the opportunity to receive a refund of all their accumulated contributions to PSRS on the condition that they transfer to MOSERS.[1] Many PSRS members transferred to MOSERS to get the refund, but others refused to accept this condition, and to accomodate their concerns, the legislature adopted legislation which allowed persons who were members of PSRS and currently employed by the State to **remain in PSRS and still receive a refund** of all their accumulated contributions to PSRS.[2] Respondents herein are persons similarly situated and seek only to be treated equally.[3]

Perhaps the most significant distortion by either of the Petitioners appears at page 3 of Nixon's petition. In discussing

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[1]1986 Mo. Laws 511 (House Bill 1496) and 1987 Mo. Laws 504 (House Bill 713).

[2]*See* §104.342.7(2) RSMo. (1992 Supp.). Incredibly, PSRS simply omits any reference to this important subsection of the statute, stopping just short of affirmatively misrepresenting that transfer to MOSERS was a prerequisite for everyone who received a refund of their personal contributions to PSRS. On the other hand, as discussed *infra*, Nixon was not similarly constrained.

[3]1989 Mo. Laws 500 (House Bill 610) -- *See* Appendix G (PSRS' Petition). This legislation also permitted former employees of Central Missouri State University who had retired under PSRS to elect to transfer to MOSERS and receive a refund of their accumulated contributions.

the effects of §104.342 RSMo.[4], Nixon states:

> This retirement election provision allowed then present employees of the State of Missouri to choose between two options. Firstly [sic] they could transfer from PSRS, a contributory retirement system, to the Missouri State Employees Retirement System (hereinafter "MOSERS"), a non-contributory retirement system with a refund of their PSRS contributions. Alternatively they could choose to remain in PSRS with no refund of retirement contributions.

Nixon's inventive analysis of the options afforded under §104.342 RSMo. is unquestionably repudiated by the plain language of §104.342.7(2) RSMo., which specifically allowed state employee members of PSRS to elect to remain members of PSRS on a noncontributing basis, and allowed them to receive a refund of all their accumulated contributions to PSRS.

Another inaccuracy appears at page 14 of Nixon's petition, wherein Nixon asserts that,

> any of the relief requested by plaintiffs against the Attorney General would in essence be a judgement against the State of Missouri, which in this case could result in a substantial money judgement and the dismantling of two retirement systems . . .

This assertion lacks any basis in law or fact. First, as discussed *infra* at Part IV, Nixon was added to this lawsuit pursuant to the legal fiction of *Ex parte* Young to allow the court to rule upon the validity of a Missouri statutory scheme and to provide remedial relief, if required, based upon its findings. PSRS -- not the State -- is the real party in interest. Second, assuming that

---

[4]All statutory references are to Missouri Revised Statutes (1992 Supp.) unless otherwise noted.

MOSERS and PSRS are the two retirement systems which Nixon alleges to be in jeopardy -- MOSERS is neither a party to nor implicated in any manner by this lawsuit, and any money judgment against PSRS would not implicate the State fisc (*see infra* at Part III).

Petitioners' assertions of half-truths and omissions from the record bring into question the credibility of all statements made by Petitioners and constitute a disservice to this Court.

ARGUMENT: REASONS FOR DENYING THE WRIT

I. THE PETITION RAISES NO SPECIAL OR IMPORTANT QUESTIONS, AND NO EXTREME DEPARTURES FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS THAT REQUIRE THIS COURT'S INTERVENTION.

The petition should be denied because it lacks any "special and important reasons" for granting it, as required by Supreme Court Rule 10.1. This case presents no new questions of law. It presents no substantial federal constitutional issue of novelty or requiring an interpretation. As will be discussed in Parts II and IV of this Argument, there is no conflict between the judgment of the Eighth Circuit for which a review is sought and the decisions of this Court. As will be discussed in Parts III and IV of this Argument, there is no conflict between the judgment of the Eighth Circuit for which a review is sought and the decisions of other Courts of Appeals. Nor has the Eighth Circuit in its order "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision," as specified in Rule 10.1(a) of this Court.

II. THE EIGHTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT IN THAT IT DID NOT SIMPLY DISMISS PETITIONERS' APPEAL, BUT FOUND THAT PETITIONERS WERE NOT ENTITLED TO ELEVENTH AMENDMENT IMMUNITY AND REMANDED FOR EVIDENTIARY FINDINGS BY THE DISTRICT COURT.

It is undisputed, as both Petitioners have recognized, that the Order of the Eighth Circuit denied Petitioners' respective claims of Eleventh Amendment immunity. *See* PSRS' petition, at 3 ("The Eighth Circuit rejected Petitioner's immunity claim"); and Nixon's petition, at 6 ("the Court of Appeals reversed the District Court's dismissal of plaintiffs' complaint as to the Attorney General . . . [and] rejected the District Court's Eleventh Amendment analysis"). In short, the Eighth Circuit rejected Petitioners' immunity claims.

Petitioners rely heavily on Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. ___, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993) ("PRASA"), for the proposition that they are entitled to an interlocutory appeal of a denial of their asserted immunity defense. Whether this Court's ruling in the PRASA case may properly be characterized as a "clarification" or an "extension" of the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), Respondents assume *arguendo* that Petitioners are entitled to an immediate appeal of a district court order denying their immunity defenses.

Petitioners' broad reading of PRASA would apparently afford every defendant who sets forth a claim of immunity from suit a fundamental right to exhaust every level of appellate review on the issue of immunity before proceeding with the underlying litigation. Such an expansive interpretation is not

only unwarranted, but potentially inundating, and the cost to the courts and the parties of permitting such exhaustive piecemeal litigation clearly outweighs any benefit to be derived therefrom. Respondents assert that PRASA does not entitle Petitioners to have all issues of immunity determined by this Court before proceeding with the merits of litigation.

Unlike the appellate courts in Cohen and PRASA, the Eighth Circuit in the case at bar did not simply dismiss Respondents' appeal. Rather, in the present case, the Appellate Court made a determination that Petitioners are not entitled to Eleventh Amendment immunity, retained jurisdiction over the case, and remanded the case to the district court for an evidentiary hearing. Thus, Petitioners have already had a determination of their immunity claims by an appellate court in accordance with the Cohen and PRASA decisions. Petitioners, however dissatisfied they may be with the Eighth Circuit's ruling, are entitled to no further interlocutory litigation.

A discussion of the analysis and application of the various factors considered by the Eighth Circuit in determining whether an entity is entitled to Eleventh Amendment immunity might prove useful for potential future litigants, however, nothing in the PRASA opinion requires specific delineation or discussion of the analysis and reasoning behind its holding that Petitioners are not entitled to Eleventh Amendment immunity -- particularly in a case such as this, where the Court of Appeals has retained jurisdiction pending factual findings by the district court.

In its PRASA opinion, this Court was careful to point out that neither it nor the Court of Appeals had considered the merits of the Eleventh Amendment defense that was raised, and that neither expressed any view on the merits of the immunity claim.

PRASA, 113 S.Ct. at 686, n. 1 (1993).[5]

This Court's recent decision in Blatchford v. Native Village of Noatak, 501 U.S. 775, 115 L.Ed.2d 686 (1991), is legally and factually distinguishable from the case at bar. That case clearly involved a suit for money damages against the State. Two important and unique issues were presented in Blatchford: (1) whether Alaska's Eleventh Amendment immunity extended to claims brought by Indian tribes (as sovereigns), and (2) if so, whether this immunity had been abrogated by 28 U.S.C. §1362. This Court held that the Eleventh Amendment barred such federal court claims for damages against the State of Alaska, and that this bar was not voided by 28 U.S.C. §1362.

The case was remanded for determination of whether any viable claim under federal law for prospective injunctive relief was justified. 115 L.Ed.2d at 700.[6] Implicit in this Court's remand was that, if a viable claim for prospective injunctive relief was justified under federal law, the State official named was a proper party to the suit.

The case at bar does not involve a suit for money damages against the State. Respondents seek the return of funds they themselves paid to PSRS, an entity which is not the State and is not the alter ego of the State (as discussed *infra* at Part III). To

---

[5]On remand, the First Circuit addressed the merits of PRASA's claim of Eleventh Amendment immunity and held the defense unavailable, noting that PRASA's inability to draw on the state treasury was crippling to its claimed defense. Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Authority, 991 F.2d 935 (1st Cir. 1993).

[6]On remand, the district court found the claims for prospective relief were moot due to the repeal of the original revenue-sharing statute that gave rise to the claim for damages, and dismissed the action. Native Village of Noatak v. Blatchford, ___ F.3d ___, 1994 WL 596953 (9th Cir. 1994).

the extent that PSRS relies on the challenged statutory scheme in its continued refusal to return Respondents' money, Respondents seek to have the challenged statutory scheme declared violative of the Equal Protection clause and/or the Due Process clause.

The Eighth Circuit's opinion in the case at bar is similar to this Court's decision in Blatchford in that both determined by implication that the State official named (here, Petitioner Nixon) was a proper party to the suit under *Ex parte* Young:

> We conclude that summary judgment in favor of PSRS and the Attorney General was not appropriate. The district court gave two reasons for its decision, neither of which withstands scrutiny. The first was that even if the challenged statutory provisions were found to violate the Equal Protection Clause, PSRS lacked authority to refund the plaintiffs' personal retirement contributions. The court reasoned that only the legislature could require such refunds. The plaintiffs, however, not only sought refunds but alternatively requested any other relief that might be appropriate, under the latter alternative, the district court at least could require PSRS to recover the refunds already made pursuant to an unconstitutional scheme.
>
> The district court's second reason was that the Eleventh Amendment bars relief because plaintiffs seek retroactive rather than prospective relief. *See Green v. Mansour*, 474 U.S. 64 (1985). We disagree. If the statutory scheme is in fact unconstitutional, the continued implementation of such a scheme constitutes an ongoing violation of federal law, regardless of whether some or all persons similarly situation to plaintiffs have already received their refunds.
>
> At this time we need not determine the outer limits of the district court's authority to order particular

> remedies, such as refunds to the plaintiffs. It is sufficient for now to say that the district court clearly has the authority to find the statutory scheme unconstitutional and to order an appropriate remedy.

Lynch v. Public School Retirement System of Missouri, 27 F.3d 336, at 338-339 (footnote omitted).

The Eighth Circuit properly rejected Petitioners' claimed Eleventh Amendment immunity defense in this case for two very sound and simple reasons -- (1) the relief sought in this case does not implicate the State fisc, and (2) the State of Missouri is not the real party in interest in this case.

III. THE EIGHTH CIRCUIT CORRECTLY DECIDED THAT THIS ACTION AGAINST THE PUBLIC SCHOOL RETIREMENT SYSTEM OF MISSOURI IS NOT BARRED BY THE ELEVENTH AMENDMENT, WHETHER OR NOT ITS OPINION CAREFULLY AND ACCURATELY ARTICULATED THE FACTORS INVOLVED IN ITS ANALYSIS OF ELEVENTH AMENDMENT IMMUNITY.

Each of the Questions Presented by Petitioner PSRS begs the initial inquiry that must be made -- whether PSRS is an entity which is entitled to Eleventh Amendment immunity. When (as here) the issue before the court is whether the Eleventh Amendment applies to the entity claiming its protection, Edelman v. Jordan, 415 U.S. 651 (1974), Green v. Mansour, 474 U.S. 64 (1985), Papasan v. Allain, 478 U.S. 265 (1986), and other similar cases have no application whatsoever.

> Those cases address the forms of relief available when it is clear that relief will run against a state; they do not address the preliminary issue of when relief is deemed to run against the state. As to the former issue, whether the primary relief sought is monetary and/or retroactive

is conclusive; as to the latter, it is not.
Kovats v. Rutgers, the State University, 822 F.2d 1303, 1310 n. 7 (3rd Cir. 1987).

In Edelman, as in Green and Papasan, there was no dispute that the Eleventh Amendment applied to the entity claiming its protection -- clearly it did -- the issue in those cases was whether the suit could be maintained pursuant to the exception created by *Ex Parte* Young, 209 U.S. 123 (1908).

This Court's prior decisions are controlling, and the rule to be derived therefrom is that the Eleventh Amendment shields an entity from suit in federal court only when it is so closely tied to the State as to be the direct means by which the State acts and to directly implicate the State treasury.

In Mount Healthy City School District v. Doyle, 429 U.S. 274 (1977), this Court held that the Eleventh Amendment did not extend to counties and similar municipal entities. *Id.* at 280. It is the nature, functioning, and source of funding of the entity, rather than the fact that it was created by state law, which decides whether it may claim the protection of the Eleventh Amendment.

In Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979), this Court declined to extend Eleventh Amendment protection to an entity which was created by state law, governed by state appointed officials, actually an agency of the state, and exercised state power in performing what was essentially a traditional state function. *Id.* at 399-402. One particular passage from Lake Country bears repeating here:

> By its terms, the protection afforded by the Eleventh Amendment is only available to "one of the United States." It is true, of course, that some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same

> practical consequences as a judgment against the State itself. But the Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a "slice of state power."

Id. at 400-401 (footnotes omitted). There is no justification for reading additional meaning into the limited language of the Eleventh Amendment.

Earlier this term, this Court decided Hess v. Port Authority Trans-Hudson Corp., No. 93-1197, 1994 WL 630234 (U.S.), which addressed the Eleventh Amendment immunity issue, and held that the Port Authority was not entitled to such immunity.[7] In Hess, this Court acknowledged that the impetus for the Eleventh Amendment was the prevention of federal court judgments that must be paid out of a State's treasury. Harmonizing the opinions of the Second and Third Circuits which were asserted to be in conflict, this Court held that the "state treasury" criterion -- whether any judgment must be satisfied out of the state treasury -- is the most important consideration in resolving an Eleventh Amendment immunity issue.[8]

The instant situation is a bit more akin to Hess than to Lake Country, in that not all of the indicators of immunity or the absence thereof point the same way. Still, if this Court were to

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[7]Petitioner PSRS apparently believed that this Court's decision in Hess would be favorable to its position, as PSRS made numerous references to Hess in its Petition, and extensively relied on its anticipated outcome.

[8]Citing cases from the 1st, 2nd, 3rd, 5th, 6th, 7th, and 8th Circuits, the Hess opinion recognized that the vast majority of Circuits have identified the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations, and, in practice, have generally accorded the "state treasury" factor dispositive weight.

remand for reconsideration in light of its decision in Hess, as urged by Petitioner PSRS, there is no reason to believe the result would be any different, for several reasons.

A. Source of Funds. The funds held in PSRS accounts are not State funds, but are derived wholly from contributions by members and members' employers (and earnings).

First and foremost, Missouri's state treasury is not implicated by, and indeed is insulated from, any judgment that may be had in this case.

At the inception of PSRS, local retirement systems were discontinued and the local school boards who had previously administered such retirement systems paid over the local money to PSRS. PSRS assumed the responsibility of providing retirement benefits to the teachers who had formerly been members of local systems. *See* §169.021(3) and (4) RSMo.

PSRS was conceived as a financially independent entity. It receives the bulk of its funds from member contributions and matching contributions from members' employers, *i.e.*, practically all of PSRS' funds come from local school districts and the teachers employed by those districts. §169.030 RSMo. Investment income accounts for PSRS' secure financial position. The vast majority of employee/members are local school teachers employed by local school districts which are clearly not a part of the State for Eleventh Amendment purposes. *See* Mount Healthy v. Doyle, 429 U.S. at 274.

The State does not appropriate funds to PSRS. On behalf of the small number of state-employed teachers that are PSRS members, the State of Missouri does contribute some funds to PSRS, pursuant to its statutory obligation as an employer to contribute matching funds. Upon their payment to PSRS, such

funds cease to be State funds. *See* §169.040 RSMo.; *accord* Kovats v. Rutgers, the State University, 822 F.2d 1303, 1308 (3rd Cir. 1987).

One of the principal defects in Petitioners' briefs on their claims of Eleventh Amendment immunity is the repeated equation of the term "public funds" with the term "state funds". They are not synonymous. PSRS holds legal title to all funds arising from the operation of the system. By statute, said funds are not "state funds" and are not even to be commingled with state funds.

> All funds arising from the operation of §§169.010 to 169.140 shall belong to the retirement system herein created and shall be controlled by the Board of Trustees of that system which board shall provide for the collection of said funds, shall see that they are safely preserved, and shall permit their disbursement only for the purposes herein authorized. The said funds and all other funds received by the retirement system are declared and shall be deemed to be the monies and funds of the retirement system and not revenue collected or monies received by the state and **shall not be commingled with state funds**.

§169.040.1 RSMo. (emphasis supplied).

This subsection draws a clear distinction between PSRS funds and State funds, vesting PSRS with title to all funds held by PSRS and depriving the State of Missouri of any right or title to said funds. The distinction is reiterated in subsection 3 where the statute provides, "all investments shall be made for the account of the retirement system, and any securities or other properties obtained by the Board of Trustees may be held in the name of the retirement system". §169.040.3 RSMo.

The distinction continues in subsection 4, which provides that PSRS funds may be deposited in a bank, but only in the name of the retirement system and checks may be made payable thereon

only in the name of the system. §169.040.4 RSMo. Suits to collect money due from members and employers must be prosecuted by the Board of Trustees in the name of the retirement system, and not by the State of Missouri. §169.030.2 RSMo. Significantly, the Treasurer of the State of Missouri has no power to collect, disburse or control PSRS funds.

The General Assembly provided start-up funds for PSRS, but required such funds to be repaid in full to the State Treasury within two years after start-up. §169.110 RSMo. (1986).

Petitioners attribute significance to the fact that PSRS is audited by the State Auditor, pursuant to §169.020.22 RSMo. While it is true that the State Auditor may only audit "public funds", she is not limited to auditing "state funds" -- she also audits cities and counties, entities which are clearly not entitled to Eleventh Amendment immunity. §29.230 RSMo.

PSRS funds are not "state funds" and are not part of the State treasury. A judgment against PSRS, it is thus apparent, would not be enforceable against the State of Missouri. Debts and other obligations of PSRS are not liabilities of the State.

B. Proprietary Functions. PSRS performs a proprietary function of investing funds and administering a retirement program.

As a starting point, Webster's New Collegiate Dictionary provides us with definitions for several terms which are of considerable importance in distinguishing between governmental and proprietary functions:

"government" is "the political function of policy making as distinguished from the administration of policy decisions"

"proprietor" is "one having an interest (as control or present

use) less than absolute and exclusive right"

"trustee" is "a natural or legal person to whom property is legally committed to be administered for the benefit of a beneficiary"

In light of these definitions, it is clear that the very nature of a trustee's job is proprietary. The function of the PSRS Board of Trustees is similarly proprietary. So-called "governmental functions" are those which are normally undertaken by a public entity for the good of the general public. PSRS is responsible for providing retirement allowances and other benefits for public school teachers, which is a distinctly narrower classification of beneficiaries than the general public. Aiding this determination is the fact that the vast majority of PSRS members are teachers employed by local school districts.

The creation, maintenance and administration of a retirement system for a specific group of employees is a function that is customarily performed by private businesses, such as insurance companies. Thus, in the case at bar, the function performed by PSRS and its trustees/administrators, in creating, maintaining, and administering a retirement system for a select group of persons is more proprietary in nature than governmental.

C. State Control. The State does not possess sufficient control over PSRS such that PSRS could properly be called an extension of the State itself.

It is fundamental that the ultimate control with every state-created entity resides with the State, for the State may destroy or reshape any unit it creates. Political subdivisions exist solely at the whim and behest of their State, yet cities and counties do not enjoy Eleventh Amendment immunity. *See* Mount Healthy City

School Dist. Bd. of Ed. v. Doyle, 429 U.S. 274, 280 (1977). Indeed, "[v]irtually every enterprise, municipal or private, flourishes in some sense at the behest of the State. But [this Court has] never found the Eleventh Amendment's protections to hinge on this sort of abstraction." Hess, slip op. at ___ (dissenting opinion of Justice O'Connor). PSRS is not entitled to Eleventh Amendment immunity.

PSRS was created by §169.020.1 RSMo. and declared to be "a body corporate . . . under the management of a board of trustees". By comparison, the Missouri State Employees Retirement System ("MOSERS") was created by §104.320 RSMo. and declared to be "a body corporate **and an instrumentality of the state.**" Likewise, the Highways and Transportation Employees' and Highway Patrol Retirement System ("HTEHPRS") was created by §104.020 RSMo. (1986) and declared to be "a body corporate **and an instrumentality of the state.**" (emphasis supplied).[9]

PSRS is a corporation separate from the State of Missouri which is empowered to sue and be sued in its own name, transact all of its own business in its own name, invest all of its funds in its own name, and hold all of its cash, securities, and other property in its own name. §169.020.1 RSMo.

Responsibility for the general administration of PSRS is vested in the seven-member Board of Trustees. §169.020.2

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[9]Comparing these examples makes clear that the Missouri General Assembly knows how to create an instrumentality of the state and knows what language is necessary to do so. Despite numerous opportunities to do so through the many amendments to legislation dealing with PSRS, the legislature has simply chosen not to structure PSRS as an instrumentality of the state. PSRS can thus be readily distinguished from MOSERS and HTEHPRS, both of which are instrumentalities of the state, by the legislatively declared difference in management and state involvement.

RSMo. Significantly, a majority of the trustees are elected by the membership rather than appointed by the State, thereby depriving the State of control of the Board. Four of the trustees are elected by the members and retired members of PSRS. The State Commissioner of Education serves as a trustee by virtue of his office. Two other trustees are appointed by the State Board of Education.

IV. THE EIGHTH CIRCUIT CORRECTLY DECIDED THAT THIS ACTION AGAINST THE ATTORNEY GENERAL OF MISSOURI IS NOT BARRED BY THE ELEVENTH AMENDMENT, WHETHER OR NOT ITS OPINION CAREFULLY AND ACCURATELY ARTICULATED THE FACTORS INVOLVED IN ITS ANALYSIS OF ELEVENTH AMENDMENT IMMUNITY.

The State of Missouri is not the real party in interest in this case merely because its Attorney General is named as a defendant. At the insistence of the District Court, Respondents added Attorney General Nixon as a party defendant in this action. The District Court may have believed the Attorney General to be a necessary party in this action because Respondents seek to have a statute (or the application thereof) declared unconstitutional. Although Missouri law is not a model of clarity on this issue, it is clear that §527.110 RSMo. (1986) requires that the Attorney General be given notice of and an opportunity to participate in any action involving the constitutionality of a Missouri statute.

Moreover, it has long been held that §1983 is a viable vehicle for vindication of federally protected rights as against acts of state government through state officials. *See* Ex parte Young, 209 U.S. 123 (1908). Although this has been tailored to some degree by the Eleventh Amendment, a federal court may properly have before it the persons who are charged with enforcing and

carrying out a statute that is constitutionally infirm, and may issue an injunction or other court order granting prospective relief to ensure that future conduct is in accordance with federal rights. It is elementary that a state cannot require conduct that violates the federal constitution.

The Attorney General of the State of Missouri (Petitioner Nixon), like the Attorney General of the State of Minnesota in *Ex parte* Young, 209 U.S. 123, 28 S.Ct. 441, at 454 (1908), has general authority to enforce the laws of the State. It is not necessary that the state official named as the nominal party representing the State have a specific duty to presently enforce the statute challenged. *Id.* at 453. Under the doctrine laid down in *Ex parte* Young and followed to the present day, the Eleventh Amendment does not bar suit against the Attorney General for a declaration that a statute is unconstitutional.

The application of Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984), cited by Petitioner Nixon, is far narrower than Nixon appreciates, as the following passage illustrates:

> When the suit is brought only **against state officials**, a question arises as to whether that suit is a suit against the State itself. . . . The Eleventh Amendment bars a suit against state officials **when "the state is the real, substantial party in interest."**

Id. at 101 (emphasis supplied; citations omitted). Here the suit is not brought only against state officials. As discussed above, PSRS is not an instrumentality of the State, and the State is not the real, substantial party in interest merely because the Attorney General has been named as a nominal party in an action seeking, among other things, a declaratory judgment on the constitutionality of a statute.

And, as noted by the Court in Will v. Michigan Dept. of State Police, 491 U.S. 58, 109 S.Ct. 2304 (1989):

> Of course a State official in his or her official capacity, when sued for injunctive relief, would be a person under §1983 because "official-capacity actions for prospective relief are not treated as actions against the State."

Will, 109 S.Ct. at 2311-12, n. 10, *citing* Kentucky v. Graham, 473 U.S. 159, 167, n. 14 (1985); and *Ex parte* Young, 209 U.S. 123, 159-60 (1908).

Petitioner Nixon further alleges that he has no authority for enforcing the challenged statutes or effectuating the relief requested by Plaintiffs. As Attorney General, however, Nixon is the statutory attorney for both MOSERS[10] and PSRS[11].

Petitioner Nixon next contends that the statutory scheme at issue has been fully enforced. This contention begs the ultimate issue -- if those portions of the statutory scheme denying Respondents' refund are found to violate the Equal Protection clause and/or the Due Process clause, the Attorney General would be under a continuing duty to enforce the laws of the State of Missouri in a manner consistent with the Equal Protection clause and the Due Process clause. Thus, only after a final determination of the obligations imposed upon Petitioners by the statute has been made in the form of a declaratory judgment will there be a sufficient basis to say whether the Attorney General's obligation has been fully performed.

Green v. Mansour, 474 U.S. 64 (1985), cited by both Petitioners, is distinguishable on its facts from the case at bar. In Green it was conceded that "any claim they might have had

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[10]§104.520 RSMo. (1992 Supp.) provides: "The attorney general of the state shall furnish, upon request, whatever legal services are necessary."

[11]§169.020.20 RSMo. (1992 Supp.), provides: "The attorney general shall be the legal advisor of the board of trustees, and shall represent the board in all legal proceedings."

for the specific type of injunctive relief approved in *Ex parte* Young was rendered moot by the amendments to the AFDC program." The issue here, on the other hand, is not moot. The policy of the PSRS has not changed -- PSRS refuses to refund to the Respondent class members their own personal contributions, money which they paid to PSRS while they were state employees. This policy continues to violate the Equal Protection and Due Process rights of Respondent class members. Declaratory and injunctive relief are available to prevent the PSRS' continued denial of equal protection regarding such refunds. As the Court in Green itself recognized, "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." 474 U.S. at 68.

CONCLUSION

For the reasons set forth above, Respondents state that the decision of the Eighth Circuit Court of Appeals does not create, or resolve, any conflict with the decisions of this Court or the decisions of other Circuits, and that Petitioners' petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 94-899

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri,
Petitioner,

v.

HAROLD LYNCH, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

REPLY BRIEF TO BRIEF IN OPPOSITION

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OCTOBER TERM, 1994

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REPLY BRIEF TO BRIEF IN OPPOSITION

I. The Court of Appeals' decision conflicts with this Court's precedent because it remands an action for an evidentiary trial on the substantive constitutional claims against a state official without determining whether those claims constitute a suit against the State in violation of the State's fundamental right to Eleventh Amendment immunity.

In its brief in opposition to the Attorney General's petition[1], Respondents argue that this Court cannot, and should not, review the

[1] In response to the Attorney General of Missouri's (hereinafter the "Attorney General") Petition for Writ of Certiorari in Case No. 94-899 and the Public School Retirement System of Missouri's (hereinafter "PSRS") Petition in Case No. 94-815, Respondents filed one brief in opposition. This reply will only address those issues related to the Petition of the Attorney General.

Eighth Circuit's refusal to determine whether Respondents' claims against the Attorney General constitute a suit against the State of Missouri in violation of the Eleventh Amendment before remanding this case to the District Court for an evidentiary trial on Respondents' substantive constitutional claims.[2]

In an attempt to justify the Eighth Circuit's inaction, Respondents argue that the Eighth Circuit did in fact resolve the fundamental question of whether Respondents' claims against the Attorney General constitute a suit against the State of Missouri in violation of the Eleventh Amendment. It merely rejected the Attorney General's claims without specific delineation of the reasoning behind its decision. Res. Br., P. 5. Next, Respondents attempt to argue that this failure has no constitutional significance because the Attorney General has already had sufficient appellate review of its immunity claim. Res. Br., P. 6. Both of these assertions are factually and legally insupportable and should be rejected by this Court.[3]

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[2] Respondents appear to argue that this Court as a matter of law, does not have the ability to review the Eighth Circuit's failure to address the fundamental issue of whether Respondents' claims against the Attorney General of Missouri constitute a suit against the State of Missouri in violation of the Eleventh Amendment. Respondents' Brief in Opposition, P. 6 (hereinafter "Res. Br. P.__"). Plainly under 28 U.S.C. §1254, this Court has the authority to reverse the Eighth Circuit's decision which exceeded its jurisdiction by 1) remanding this case to the District Court without determining whether Respondents' claims against the Attorney General constitute a suit against the State of Missouri in violation of the Eleventh Amendment and 2) requiring the District Court to proceed with an extrajurisdictional trial on Respondents' substantive constitutional claims without such a determination.

Given the important issues presented in the Attorney General's Petition regarding the fundamental right of States not to be sued in federal court and the permissible scope of federal court jurisdiction, this Court should exercise that authority and reverse the Eighth Circuit's decision.

[3] In its response to the Attorney General's Petition, Respondents challenge the Attorney General's statement of the case as containing serious inaccuracies and omissions. Res. Br., P. 2-3. The Attorney General intended to enumerate sufficient facts necessary to enable this Court to decide the immunity issues presented in his Petition. Significantly, Respondents in their attempt to impute an improper motive to the Attorney General do not claim that the facts as presented by the Attorney General are insufficient to determine the immunity issues presented.

Respondents first attempt to deny that the Eighth Circuit refused to address, much less resolve, the fundamental issue of whether Respondents' claims against the Attorney General constitute a suit against the State of Missouri in violation of the Eleventh Amendment.[4] This is in direct conflict with the Eighth Circuit's opinion itself. First, the Eighth Circuit refused to determine whether, in the absence of any connection with the enforcement of the statute that allegedly violated Respondents' rights, this suit against the Attorney General constitutes a suit against the State of Missouri, which absent a waiver, cannot proceed regardless of the relief sought. *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 102, citing *Cory v. White*, 457 U.S. 85, 90-91 (1982). Instead, it proceeded directly to determine whether the relief sought was prospective in nature, an analysis that becomes relevant *only* if the suit does not constitute a suit against the State of Missouri. Pet. App. A-25.

Secondly, the Eighth Circuit expressly refused to examine which remedies, if ordered against the Attorney General, would violate the Eleventh Amendment. The Court specifically stated as follows:

> At this time we need not determine the outer limits of the district court's authority to order particular remedies, such as refunds to plaintiffs. It is sufficient for now to say that the district court clearly has the authority to find the statutory scheme unconstitutional and to order an appropriate remedy.

Pet. App. A-25. This cannot be construed as the omission of "specific delineation or discussion of the analysis and reasoning behind its holding that Petitioners are not entitled to Eleventh Amendment immunity" as Respondents attempt to characterize the Eighth Circuit's opinion. Res. Br., P. 6. This is a blatant refusal to determine what relief

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[4]Respondents attempt to argue that the Attorney General admits that the Eight Circuit made this necessary and fundamental inquiry because the Attorney General maintains that the effect of the Eighth Circuit's refusal to look at this issue is a denial of the State of Missouri's fundamental right not to be sued in federal court. Res. Br., P. 5. To the contrary, the Attorney General does not admit that the Eighth Circuit resolved this most basic and fundamental issue. Respondents are attempting to bootstrap the effect of the Eighth Circuit's abdication of its responsibility to resolve these issues, into what the Eighth Circuit actually did.

is permissible, and against whom the relief would be appropriate consistent with the Eleventh Amendment. Yet, this determination is essential in determining whether the Eleventh Amendment bars Respondents' claims against the Attorney General.

Respondents next argue that this Court should not review the Eighth Circuit's opinion because to allow States to vindicate their claims to Eleventh Amendment immunity is "unwarranted," "inundating," and "the cost to the courts and the parties of permitting such an exhaustive piecemeal litigation clearly outweighs any benefit to be derived therefrom." Res. Br., P. 6. This Court has already balanced the fundamental right of States and their officials to be free from suit in federal court and the efficiency concerns listed by Respondents. That balance mandates that the entitlement to immunity be determined prior to the State being subjected to a trial on the underlying claims of Respondents.

In *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, ___U.S.___, 113 S.Ct. 684, 687 (1993), this Court held that States and their entities may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity from suit in federal court. Moreover, the Court held that the Eleventh Amendment is a withdrawal of jurisdiction that confers immunity, not just from liability after a full trial on the merits of the underlying claim, but from suit in the first instance. *Id.*

The basis for this decision is threefold. First, the denial of Eleventh Amendment immunity purports to be a conclusive determination that a State has no right not to be sued in federal court. *Id.* at 688. Second, a State's claim to Eleventh Amendment immunity "involves a claim to a fundamental constitutional protection, whose resolution generally will have no bearing on the merits of the underlying action." *Id.* Third, the value of a State's constitutional immunity is effectively lost as litigation proceeds past motion practice and the denial of immunity is effectively unreviewable on appeal after a final judgment. *Id.* Though it appears that Respondents do not agree with the Eleventh Amend-

ment principles espoused by this Court in *PRASA*, they have offered no valid reasons why this Court should reverse its recent decision.[5]

II. The Court of Appeals' opinion directly conflicts with this Court's opinion in *Ex parte Young* and decisions in other Circuits which hold that in the absence of a sufficient connection between the official sued and enforcement of the allegedly unconstitutional statute, the suit constitutes a suit against the State in violation of the Eleventh Amendment.

In its opposition to the Attorney General's Petition, Respondents specifically state "...there is no conflict between the judgment of the Eighth Circuit for which a review is sought and the decisions of other Courts of Appeals." Res. Br., P. 4. However, Respondents do not even attempt to reconcile the Eighth Circuit's decision with the decisions in other Courts of Appeals which hold that the official sued must have a sufficient connection with the enforcement of the statute that allegedly deprived plaintiffs' rights or the suit is nothing more than an attempt to sue the State itself in violation of the Eleventh Amendment. *Sherman v. Community Consol. Sch. Dist. 21 of Wheeling Township*, 980 F.2d 437, 441 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 2439 (1993); *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir, 1992); *Southern Pac. Transp. Co. v. Brown*, 651 F.2d 613, 614-15 (9th Cir. 1980); and *Kurz v. State of Michigan*, 548 F.2d 172, 174-75 (6th Cir. 1977), *cert. denied*, 434 U.S. 972 (1977). In fact, such a reconciliation would be impossible. The Eighth Circuit's opinion directly conflicts with the decisions of other Courts of Appeals which correctly applied the principles enunciated by the Court's decision in *Young*.

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[5] Respondents do not dispute the validity of the principles underlying the *PRASA* decision when referring to a district court's denial of a State's claim to Eleventh Amendment immunity. Instead, Respondents attempt to argue that the those principles do not extend to a Court of Appeals decision, which refuses to determine whether Respondents' claims constitute a claim against the State of Missouri, resulting in a denial of Missouri's claim to Eleventh Amendment immunity. Res. Br., P. 5-6. This distinction lacks any constitutional significance and should be rejected by this Court. A State's entitlement to immunity from suit is rendered no less meaningless if the Court of Appeals refuses to determine the entitlement to Eleventh Amendment or wrongfully denies it rather than a district court.

Young requires that the official sued have a sufficient connection with the enforcement of the statute that allegedly deprives the plaintiffs of their constitutional rights or the suit is a suit against the State itself in violation of the Eleventh Amendment. The Court in *Young* specifically held:

> [I]ndividuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

209 U.S. at 156. In order to justify this exception to Eleventh Amendment immunity, *Young* requires not only that the official sued have the authority to enforce the law in question, but that the official has threatened to exercise, or has exercised that authority to the detriment of plaintiffs. *Id.* Otherwise suing a state official without this connection to the enforcement of the statute "is merely making him a party as a representative of the state, and thereby attempting to make the state a party." *Id.* at 157.

The Eighth Circuit's decision completely ignores this requirement, and directly conflicts with the core holding and policy behind this Court's decision in *Young*. Neither in their fourth amended complaint, nor in their brief in opposition to the Attorney General's Petition, are Respondents able to cite to any authority the Attorney General possesses to enforce the allegedly unconstitutional refund provision against Respondents — much less any action or threatened action the Attorney General has taken to the detriment of Respondents.

Respondents appear to assert that because Mo. Rev. Stat. § 527.110 (1986) requires the Attorney General to be given notice of, and an opportunity to participate in, any action involving the constitutionality of a Missouri statute, that the Attorney General is a proper party to this action consistent with the Eleventh Amendment. Res. Br., P. 17. Although the Attorney General has the ability to intervene in any action in which the State's interests are involved, where he has not used that official power to enforce an allegedly unconstitutional statute to the detriment of Respondents, any attempt to sue him in his official

capacity is merely an attempt to sue the State of Missouri in violation of the Eleventh Amendment. *Young*, 209 U.S. at 157.

Respondents further contend that the Attorney General, as the statutory attorney for the PSRS and the Missouri State Retirement System (hereinafter "MOSERS") had authority to enforce the allegedly unconstitutional statute to their detriment. Res. Br., P. 19. Merely being the statutory attorney for these entities conferred no power on the Attorney General to adopt, implement or enforce the refund scheme Respondents allege violated their rights. Nor does this representative role provide sufficient connection to the enforcement of the statute to allow justify prospective relief under *Young*. 209 U.S. at 157-58.

It is clear from the face of Respondents' fourth amended complaint, that the Attorney General has not threatened to use his official authority to the detriment of Respondents and in fact has no authority to do so. The Eighth Circuit's decision in this case requiring the Attorney General to remain a party to this lawsuit absent any connection with the enforcement of the statutory scheme that allegedly violated Respondents' rights effectively allows a suit against the State of Missouri in violation of the Eleventh Amendment. This decision contradicts not only the holding, but the core policy behind this Court's decision in *Young* and conflicts with the decisions of other Court of Appeals decisions who correctly applied *Young*.

Without clarification from this Court, the Eighth Circuit's opinion will allow a perspective plaintiff to sue any state official regardless of whether or not they had any connection with the enforcement of the allegedly unconstitutional statute, in an attempt to secure a judgment against a State in violation of the Eleventh Amendment.[6]

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[6] Respondents continually assert that the State is not the "real, substantial party in interest merely because the Attorney General has been named as a nominal party..." Res. Br., P. 18. Yet, because the Attorney General had absolutely no connection with the refund scheme at issue, this suit against the Attorney General constitutes a suit against the State of Missouri. Clearly the State of Missouri has a "real" and "substantial" interest in this lawsuit brought in violation of its fundamental right to immunity.

III. The Court of Appeals' decision allows claims under 42 U.S.C. § 1983 against State officials for retrospective relief in violation of the Eleventh Amendment.

Assuming for the sake of argument that the Attorney General is a proper party to this lawsuit, Respondents' claims against the Attorney General — which seek only retrospective relief — are nonetheless barred by the Eleventh Amendment. In reversing the District Court's determination that Respondents' claims against the Attorney General are barred, the Eighth Circuit relied on an erroneous characterization of the nature of the alleged constitutional violation as well as the nature of the relief sought by Respondents in denying the Attorney General Eleventh Amendment immunity.

As enumerated by the Attorney General in his initial Petition, the District Court examined the specific nature of the violation and found that "[t]here is simply no ongoing violation of federal law. Any alleged violation occurred in 1987 and 1989 when the then present state employees received refunds of their pension contributions to the exclusion of plaintiffs under § 104.342." Pet. App. A-19 - A-20. The District Court's opinion is consistent with decisions of this Court, which hold that such past alleged action cannot be deemed "ongoing" for purposes of the Eleventh Amendment. Yet in their brief in opposition, Respondents wholly failed to distinguish their attempt to plead a continuing wrong by alleging that PSRS continues to refuse to refund their retirement contributions, from the same pleading maneuvers rejected by this Court in *Papasan v. Allain*, 478 U.S. 265, 280 (1986) and *Edelman v. Jordan*, 415 U.S. 651, 668 (1974).

With regard to the nature of the relief requested the District Court found that:

> "[t]his court may not issue a declaratory judgment finding that the state or state official violated federal law in the past when there is no ongoing violation of federal law. *Green v. Mansour*, 106 S.Ct. 423, 438 (1985). Plaintiffs seek a cash reimbursement of their contributions because they allege the state violated their constitutional rights in the past when it did not grant them refunds. This request amounts to a retroactive damage award

> which is barred by the Eleventh Amendment. See *Edelman*, 94 S.Ct. at 1358."

Pet. App.A-20. Yet, in their brief in opposition to the Attorney General's Petition, Respondents wholly failed to distinguish their request for relief from the retrospective relief this Court prohibited in *Green v. Mansour*, 474 U.S. 64 (1985)[7], *Edelman*, 415 U.S. at 668, and *Papasan*, 478 U.S. at 280, as violative of the Eleventh Amendment.

The Eighth Circuit's opinion, which accepts at face value Respondents' semantical attempts to avoid the Eleventh Amendment and fails to look at the substance of the injury alleged and the relief requested by Respondents, eradicates the distinction this Court has carefully drawn between valid prospective injunctive relief, which is necessary to vindicate the federal interest in assuring the supremacy of federal law, and retrospective relief, which is clearly barred by the Eleventh Amendment. Intervention by this Court is necessary to prevent the Attorney General, and hence the State of Missouri, from being subjected to this extrajurisdictional trial on Respondents' substantive constitutional claims when it is clear from the face of Respondents' complaint that the Attorney General and the State of Missouri are entitled to Eleventh Amendment immunity.

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[7]Respondents make a feeble attempt to distinguish on its facts this Court's decision in *Green* from the present case. Res. Br. P. 19-20. This attempt, however, does not distinguish the legal applicability of *Green* to the present case. The salient principle of *Green* is that where there is no availability for valid prospective injunctive relief under *Young*, a declaration that state officials violated the Constitution in the past would serve no other purpose except to allow Respondents to offer such a declaration in the state court proceeding already filed as evidence of liability. *Green*, 474 U.S. at 74. Respondents could then claim the only issue left for determination is damages. To allow a declaration in such circumstances would in effect be indistinguishable from a full fledged award of damages against the State in violation of the Eleventh Amendment. *Id.*

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted by this Honorable Court.

Respectfully Submitted,

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